

Reforming the United Nations Security Council: Making it more Democratic in the Post- Westphalian Legal Order

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Submitted in accordance with the requirements for the degree of Doctor of
Philosophy De Montfort University Faculty of Business and Law, United
Kingdom

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September 2015

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ABSTRACT

The Security Council has sometimes failed to perform its main duty, which is the maintenance of international peace and security. The Council's responsibilities in this regard have grown as new international challenges have emerged. These challenges include global environmental issues, refugee flows and mass migration across borders, the rapid spread of infectious diseases, civil war that threatens international peace and security, global terrorism, transnational crime and illegal stocks of nuclear, biological and chemical weapons. The Security Council has thus become the subject of both severe criticism and calls for its structural reform. A variety of reform proposals have been offered by scholars and politicians, almost all of which have focused solely on state-based solutions. The current study considers that reforming the Council through such means would not alter its current state to any significant extent. International law no longer reflects the state-based system of the Westphalian World Order. The international legal order does not involve only nation-states, and state-based systems are not able autonomously to deal with problems such as these in the post-Westphalian era. It is widely acknowledged that there are many non-state actors that could contribute to enhancing the Council's representativeness, effectiveness and accountability. It is thus concluded that a reform proposal for the Security Council must consider these factors and produce a non-state based solution. It is proposed that the Council must consider granting formal access to Non-Governmental Organizations (NGOs) that have, as non-state actors, been active in the international legal order, and that have already made significant contributions to the above-mentioned issues.

Acknowledgements

Many challenges can occur during the long process of researching and writing a PhD, challenges that are hard for a student to cope with alone. The supervisor is the first port of call in trouble, more so for an international student. I am indeed indebted to my supervisors. Foremost, I would like to express my gratitude to Tim Hillier, Associate Head (undergraduate) at De Montfort University's Law School. He has been a most patient mentor whose has been very helpful in providing critical and insightful comments and moral support. Secondly, I would like to thank Professor Gavin Dingwall, Professor of Criminal Justice Policy and Faculty Head of Research Students at the Law School. I have benefited from his astute observations and particularly for his encouragement during my study. I also express my thanks to Dr. Alwyn Jones, Principal Lecturer at the Law School. He has given generously of his time and allowed me to ask questions whenever I needed to do so. His shrewd and useful comments have also been highly beneficial to this study.

I have felt very lucky to be under their supervision, and I will never forget their patient, indefatigable supervision. I would not have been able to complete this work without their painstaking comments and encouragement.

I would also like to express my thanks to staff members of the De Montfort Law School for their considerable support and kindness, and to Anselm Kersten and Alwyn Jones for their extraordinary patience in proofreading the manuscript, and also my friend Conrad Nyamutata.

Obviously, none of this would have been possible without my family, to whom I would like to express my thanks.

In addition I would like to make special mention of the Turkish Ministry of Education, without whose financial support I could not have studied in the UK. Lastly, my best regards and best wishes go to all those who supported me in any respect during my PhD.

List of Abbreviations

CARE	Cooperative for American Relief Everywhere
CCSC	Consultative Committee of the Security Council
CD	Cosmopolitan Democracy
CSD	Commission on Sustainable Development
ECOSOC	Economic and Social Council
ICC	International Criminal Court
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
IGOs	Inter-Governmental Organisations
INGOs	International Non-Governmental Organizations
MSF	Medecins Sans Frontieres
MNCs	Multinational Corporations
NGOs	Non-Governmental Organizations
OHCHR	Office of the United Nations High Commissioner for Human Rights
UIA	Union of International Associations
UNCTAD	United Nations Conference on Trade and Development
UNIDO	United Nations Industrial Development Organization

UNSC	United Nations Security Council
USAID	United States Agency for International Development
WTO	World Trade Organisation
WWF	World Wildlife Fund
WWO	Westphalian World Order

CHAPTER ONE

Introduction and Summary of Main Arguments

The reformation of the United Nations Security Council (UNSC) has become one of the main areas of concern for many academics and politicians, possibly because the Council plays a very significant role in ensuring the safety of the world community. It has thus always been at the centre of discussions in emergencies and conflicts. Critics have cited its veto powers as reasons for its failures. In fact, the history of the UNSC presents a mixed picture. The UNSC has had considerable success in maintaining international peace and security.¹ On this point, the International Commission on Intervention and State Sovereignty's 2001 report states :

*there is no better or more appropriate body than the United Nations Security Council to authorize military intervention for human protection purposes...The task is not to find alternatives to the Security Council as a source of authority, but to make the Security Council work better than it has.*²

The UN's actions are not always adequate. There is sometimes a failure to maintain international peace and security, mainly due to the obstacle presented by the use of the veto. For example, in the ongoing case of Syria, the UNSC has repeatedly been criticised for not taking action.

¹ Examples are Cambodia, Mozambique, Haiti and Timor-Leste including long standing peacekeeping troops in Kashmir. Vijay Mehta. 'Reforming and Strengthening the UN for the 21st Century' (2010), p.3. Others include the establishment of the International Criminal Tribunals for Rwanda (ICTR) in 1994 and the former Yugoslavia (ICTY) in 1993

² The report of the International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (December, 2001), 49

The UNSC has failed several times to take action because of this use of the veto.³ Thus, many naturally believe that the Council would work better if they could remove the veto or change the Council's size.⁴ The majority of previous reform proposals have mostly focused on removing or restricting the veto power, as well as on adding more permanent members or non-permanent members.⁵ It may be indeed important to remove Council members' veto powers, but if the current realities of the world order make the achievement of such an end by direct amendment of the Charter impossible at present, an alternative would be to add more member states. The degree to which this would be efficacious is, however, debatable.

There are in fact two reasons why these proposals are wrong. Firstly, an analysis of the UNSC's structure makes it clear that the veto power is not the only problem. To illustrate this point, when the Council's permanent members apply the veto to block it from taking action, it might be thought that there is no way to overcome this deadlock. Yet this is an assumption that cannot be taken for granted. The authority emanates from the Uniting for Peace Resolution⁶, which stipulates that the General Assembly to take an active role when the

³ In the case of Syria, the US, UK and France resolved to take action against the Bashar al-Assad regime to prevent violence against civilians, but this resolution was vetoed by Russia and China, which is why the UNSC could not take an active role on that occasion. For more details, see 'Russia, China veto U.N. resolution on Syria' <<http://www.usatoday.com/news/world/story/2012-02-03/un-syria-resolution/52951158/1>> (accessed 23/02/12)

⁴ See Ingo Winkelmann, 'Bringing the Security Council Into New Era: Recent Developments in the Discussion on the Reform of the Security Council' (1997) 1 *Max Plank Yearbook of United Nations Law*, 35-90; Brian Cox, 'United Nations Security Council Reform: Collected Proposals and Possible Consequences' (2009) 6 *South Carolina Journal of International Law and Business*, 89-128; and Michael J. Kelly, 'UN Security Council Membership: A New Proposal for a Twenty-First Century Council' (2011) 31 *Seton Hall Law Review*, 319-407

⁵ Center for UN Reform Education, 'Security Council Reform' <http://www.centerforunreform.org/?q=securitycouncil>

⁶ L. H. Woolsey, 'The Uniting for Peace Resolution of the United Nations' (1951) 45 *AJIL*, 129-137. This resolution is discussed further in Chapter III

Security Council fails to solve an issue of international peace and security through inefficiency or the use of the veto. This implies two things: the permanent Council members do not bear all the responsibility for the Council's failures, but also that those permanent members are not completely innocent in this regard – they have often played significant roles in gridlocking the Council.

The second reason is that such a state-based approach is neither adequate nor sufficient to meet the demands of the current world order. There are now new actors and new threats. The UNSC was product of a time when states were the only actors on the international stage; the main threat was an attack by one nation state on another. The purpose for which the UNSC was originally designed is no longer relevant to the current world order. Any reform proposal cannot therefore ignore these new facts by simply restricting itself to 1945-era state-based solutions.

The issue of UNSC reform should be treated according to the facts of current world conditions. There is no doubt that a more democratic UNSC is needed, but this entails proposals that go beyond state-based solutions. Neither can practical obstacles such as the veto wall⁷ and the consensus problem⁸ be ignored. In order to avoid a similar fiasco, any reform proposal should therefore certainly not be constricted in any way by these obstacles (or at least should not be totally dependent on them).

⁷ Article 27 of the UN Charter

⁸ The consensus problem is one of the main obstacles to the UN's implementation of reform proposals, primarily because some states find such proposals at least partly inimical to their own interests.

1.1 Aim and Scope

This study finds that one of the UNSC's main problems is its state-based composition, a product of the 1945 Westphalian world order.⁹ This anti-democratic structure must be remoulded as a more egalitarian one, because as it stands it renders the UNSC unable to deal appropriately with international problems. Yet any attempt at reformation would be unsatisfactory without consideration of the current international legal order. A solution for the UNSC's decision-making process should thus be both satisfactory and feasible. In this regard, the present study finds Cosmopolitan Democracy (CD) to be the most relevant type of democracy for its purposes.¹⁰ The author proposes brining the UNSC into the post-Westphalian era¹¹ in order to make it a more democratic body that would solve its problems regarding efficiency, accountability and representativeness. The author discusses new concerns such as those relating to NGOs that must be accommodated in the UNSC's decision-making process. The main focus point of the present work is thus reforming the UNSC in order to make it more democratic.

Secondly, as the UNSC is an international body, the question of how an international entity could be made more democratic is addressed. It is found that this notion became popular just after the collapse of the Soviet Union in 1991. It is argued that developing more democratic

⁹ "The Westphalian world order" refers to a system in which states are considered to be the sole actors in international law. This era began in 1648 with the Peace of Westphalia that ended the Thirty Years' War

¹⁰ This is evaluated in Chapter II

¹¹ Richard A. Falk, *Law in an Emerging Global Village: A Post-Westphalia Perspective* (Transnational Publishers, 1998)

international institutions is possible by the inclusion of non-state actors.¹² It will also be argued in this thesis that an international institution like the UNSC would be democratically validated by including NGOs. These facts have led the author to investigate how the international legal order has been exercised in practice, particularly after 1991. It is found that this order has significantly changed since the establishment of the UNSC. The period that began after the collapse of the Soviet Union and the development of the Internet is known as the post-Westphalian order. This order is therefore scrutinised to find the realities of the current international legal order.

On the other hand, this proposal might prove to be too contentious to implement at present. This is a prospective agenda that might require some other stages before it can be effected. On this point, even though it does not require any Charter amendment, its implementation would also face challenges from political realities. This proposal could thus be seen as a potential project. Yet mechanisms by which NGOs can be allowed more influence on the UNSC must be found.

This proposal is significant in that it presents alternative ways of reforming the Council. It constitutes more than just a consideration of the Council's problems. It considers such issues as how permanent and non-permanent Council members can be made to act more responsibly, and how they can be obliged to commit to the responsibility given to them. The current study suggests that alternative ways must be developed to push the Council to work

¹² David Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Stanford University Press 1995), 233; Boutros Boutros-Ghali, 'An Agenda For Democratization: Democratization at the International Level' in Barry Holden ed. *Global Democracy: Key Debates* (Routledge 2000) 105

more effectively, rather than constantly going over old and unfruitful ground. This would hopefully prompt the search for alternative ways to solve the UNSC's problems. While it may not be a practical means of solving the gridlock resulting from the use of the veto, it would hopefully help to solve that gridlock insofar as it results from purely state-based solutions by opening the way for an alternative means of Council reform.

In fact, there is already an example of alternative approach that has aimed to push the UNSC to be more responsible for maintain international peace and security: Responsibility to Protect (R2P). This was first announced in 2001, approved in 2005, and the intention was for it be finally implemented by the UNSC in 2011 in Libya. R2P also provides an alternative way to push states to take more responsibility for maintenance of international peace and security. Rather than asking for a Charter amendment, it develops strategies to limit areas in which self-interested states can use their veto power. There might be some similarities between the proposal made in the present thesis and R2P. The latter has three main pillars: responsibility to prevent, responsibility to react and responsibility to rebuild.¹³ This study also pays close attention to role of NGOs in preventing conflicts, in pushing states to take action when prevention fails, and their role in the reconstruction of war-torn societies. This study is, however, specifically about role of NGOs in making the UNSC more responsive to international peace and security in the context of the current international legal order. The R2P agenda has thus not been directly addressed in this thesis.

¹³ Gareth Evans, *R2P: The Next Ten Years* (2015) Oxford Handbook on the Responsibility to Protect

1.2 Developing Solutions and Making a Reform Proposal

The problem with the UNSC is manifestly its anti-democratic state-based system, which makes it unable to perform its primary responsibility. The remedy is to make it more democratic. Which form of democracy and how it could be implemented are the questions to be decided.

The answer to the former is CD. The theory should answer the purposes of this thesis, which include resolutions to such problems as the reformation of an international organization, the implementation of such democratic principles as accountability, representativeness and effectiveness, a decrease in the use of military force, the inclusion of new actors in the international legal order, the abrogation of purely state-based structures and the adoption of a progressive approach (i.e. one that works toward a solution rather than implementing it all at once). CD is the most suitable method of answering these purposes.¹⁴ The reasons why this form of democracy is proposed is explained in detail in Chapter II.

There are several reasons why NGOs constitute the means by which the UNSC could be made more democratic. The solution they provide is more feasible. NGOs have already established informal relationships with the Council. It would thus be easier to formalise these relationships than to establish them from scratch with new non-state actors. Indeed, Article 29 of the Charter and Rule 39 of the Provisional Rules of Procedure of the Security Council make it possible to establish formal relationships with NGOs. NGOs are also very important

¹⁴ See the table of criteria of Cosmopolitan Democracy: Daniele Archibugi, *The Global Commonwealth of Citizens: Towards Cosmopolitan Democracy* (Princeton University Press, 2008), 103-106

agents in the performance of the UNSC's responsibilities. Lastly, in order to achieve democracy, it is necessary to consider the participation of new actors in the international legal order. In this regard, formal participation of NGOs, which are such actors, would naturally eliminate the UNSC's democracy deficit.

The current study also provides a definition for NGOs that could be granted formal access¹⁵ to the UNSC. The definition of an NGO used in this study is that it is international in character, independent of any state and free of governmental influence, that its aims are non-profit, non-violence, not obviously connected with criminality, not political or subversive, and conform to the spirit, purposes and principles of the UN Charter, that it has standing within its sphere of interest and is particularly active in the field of humanitarian aid such as security, peace, human rights, poverty, health and education, and that it has a democratically adopted statute, representative and transparent structure and is accountable in its actions.¹⁶

¹⁵ Formal access refers to granting accredited NGOs Council access through a committee. Informal access means that NGOs could meet Council members as the latter deem necessary. Informal access is discussed in detail in Chapter 5 and formal access in Chapter 7.

¹⁶ This point is discussed in detail in Chapter 4.

1.3 Importance of Study

The reformation of the Security Council has been evaluated in relation to state-based solutions such as enlarging the size of the Council by adding more members and removing or limiting the veto power. Little attention has been paid to developing relationships between NGOs and the Council. There is thus a paucity of literature regarding relations between the UNSC and NGOs. The current study such literature as exists on this topic. The people mentioned below are important for two main reasons. Firstly, to the best of the author's knowledge they are only ones who have paid attention to the relations between NGOs and the Council. Secondly, the current study briefly compares its proposal to its predecessors in order to illustrate its originality and how it contributes to the literature.

Firstly, Archibugi cursorily considers consultative status for NGOs on the Council¹⁷ as one suggestion in his discussion of CD, although he provides no background or detailed analysis for such a reform. In supplying these, the present research fills a gap in the current state of knowledge.

Secondly, James Paul outlines the relations that have developed between the Council and NGOs.¹⁸ He evaluates to some extent the inequality of informal relations and provides reasons why this should be so, and he illustrates the outcomes of interactions between the Council and NGOs. He does not, however, offer any views as to the potential directions that

¹⁷ Archibugi (2008), p.282

¹⁸ James Paul, 'Working with Nongovernmental Organizations' in David Malone (ed.) *The UN Security Council: From the Cold War to the 21st Century* (Lynne Rienner, 2004), 386

such development could take. This study has gone further: it investigates the development of informal relations and, makes theory-based predictions regarding the formal participation of NGOs. It uses the theory of CD¹⁹ to justify formal participation by NGOs on the Security Council.

Third, Martin Binder examines whether and to what extent the Security Council grants access to civil society.²⁰ He illustrates the shift that has taken place in the Security Council's scope and authority, as well as its politicization, as non-permanent members have used NGOs to counterbalance the "Big Five". However, he does not speculate on any future developments or resolutions regarding relations between the Council and NGOs. The current study has taken the issue well beyond a mere focus on the counterbalancing ability of NGOs. It has identified several salient points regarding NGOs' contribution to the Council, such as enhancing its representativeness, accountability and effectiveness.

Fourth, Jonathan Graubart examines the involvement of NGOs in the Council's peace-building operations. He takes a critical approach to this involvement, believing that relations between humanitarian NGOs and the Security Council in this regard are primarily intended to promote the political interests of the powerful sponsors rather than the subject populations.²¹

¹⁹ CD considers it essential that decision-making processes involve all individuals affected by those decisions.

See n.1 above

²⁰ Martin Binder, *The Politicization of International Security Institutions: The UN Security Council and NGOs* (2008) Social Science Research Center, Berlin

²¹ Jonathan Graubart, 'NGOs and the Security Council: Authority All Around but for Whose Benefit?' in Bruce Cronin & Ian Hurd (eds.) *The UN Security Council and the Politics of International Authority* (Routledge, 2008), 154-172

The present study, on the contrary, finds positive outcomes of NGOs' activities and suggests that informal relations be transformed into formal ones.

Fifth, Pini Pavel Miretski evaluates the relations between the Security Council and non-state actors.²² He examines the legality of those Council Resolutions that deal with such agents. Yet he does not deal with NGOs separately, and does not so much as mention the Arria Formula. His concern is rather to examine the limits of the Council's authority in its dealings with non-state entities. The present study, by contrast, pays particular attention to NGOs by analysing and evaluating their participation in detail.

Lastly, Martin Daniel Niemetz's study of Council reform is the most recent to be published.²³ He analyses NGOs' participation in detail, but he concludes by disagreeing with the development of formal relations between NGOs and the Council, believing rather that they should be able to make the best use of current informal methods of increasing their influence on the Council rather than broadening these relations. He also offers a state-based solution, as he believes that the General Assembly should have more responsibility for security and peace issues. The current research disputes this, concluding that current informal relations are inadequate and subject to the arbitrary actions of Council members. The present research therefore finds that it is necessary for the Council to establish formal access for NGOs.

²² Pini Pavel Miretski, 'Delegitimizing or Evolving?: The Legality of UN Security Council Resolutions Imposing Duties on Non-State Actors' (2009) Social Science Research Network

²³ Martin Daniel Niemetz, *Reforming UN Decision-Making Procedures: Promoting a Deliberative System for Global Peace and Security* (Routledge, 2015)

This thesis offers a new approach to the issue of reforming the Security Council. Firstly, its proposal does not require any Charter amendments,²⁴ which makes it both more practicable and distinct from previous state-centred reform proposals. The present research takes the idea of establishing formal relations beyond a mere suggestion, providing reasons and possible outcomes in detail and using CD to justify its arguments. The author believes that this study would advance the granting of formal participation to non-state actors. It may also increase the opportunity for non-state-based discussions regarding the issue of Security Council reform. Lastly, it might contribute to the literature evaluating the importance of participation by NGOs on the Council.

²⁴ All that would be required would be to apply Article 29, which states that “[t]he Security Council may establish such subsidiary organs as it deems necessary for the performance of its functions.” This point is discussed in detail in the Chapter 6

1.4 Methodology

Certain methodologies have been described in this work in order to identify the most appropriate ones for this inquiry. Those investigated are functionalism and institutionalism, CD and the Principle of Maximum Effectiveness.

There is no single correct or perfect methodology or school of thought.²⁵ Indeed, a study could incorporate one or more methodologies in accordance with the character and requirements of the research.²⁶ It should initially be emphasized that the issue of Security Council reform concerns more than just law, but also involves international relations and politics.²⁷ An exclusively legal method might thus be counterproductive in unnecessarily constraining the inquiry.²⁸ The proposed research approach is therefore theoretical in nature and combines doctrinal international law with interdisciplinary material, particularly from international relations and politics. As an international relations theory, CD has made important theoretical contributions to the current study. It is also used to provide supporting arguments and reasons for and evaluations of the solution identified. The further relevance of those theories is explained later in this section.

²⁵ Steven R. Ratner & Anne-Marie Slaughter, 'Appraising the Methods of International Law: A Prospectus for Readers' (1999) 93 *AJIL* 2

²⁶ Caroline Morris & Cian Murphy, *Getting a PhD in Law* (Oxford, 2011) 29

²⁷ Sabine Hassler, *Reform of the UN Security Council Membership: An Analysis of the Desirability, Effectiveness Achievability of a Representative Security Council Membership* (PhD thesis, University of the West of England 2009) 5

²⁸ *ibid*

Hassler believes that engaging with the issue of Security Council reform from a positivist perspective would provide neither “a future outlook nor a hypothetical exploration of reform”.²⁹ Functionalism can be thought of as a political theory that “contributes to an understanding of the broad range of man’s political activities”.³⁰ It assumes that all people are intrinsically “good, rational, and devoted to the common weal”.³¹ The ideals and values shared by humans around the world might not be amenable to expression at the lowest level.³² Resolutions could be achieved by experts beyond the nation state³³ at the supranational level.³⁴ In other words, it is possible for experts rather than nation-states to resolve international problems. As a theory of international relations, functionalism implies that states have become obsolescent.³⁵ It emphasizes the significance of public goods and demands their equal distribution among states and non-state actors. This implies the increased importance of NGOs, experts and scientists in light of the erosion of states’ sovereignty.³⁶ It also seeks to define the problems stemming from an anarchic system of international society so as to provide a prescription for ways of constructing a better world.³⁷

Although functionalism has some merits, such as its emphasis on an incremental increase in peace, there are some drawbacks to this approach. Functionalism limits participation to

²⁹ n.21

³⁰ Paul Taylor ‘Introduction’ in David Mitrany, *The Functional Theory of Politics* (1975), ix

³¹ Ernst B. Haas, *Beyond the Nation-State: Functionalism and International Organisation* (1968) 8

³² *ibid*

³³ *ibid*

³⁴ Hans J. Morgenthau, ‘Positivism, Functionalism, and International Law’ (1940) 34 *American Society of International Law* 261

³⁵ Mitrany argues that state authority in the modern era had been called into question. Oliver Daddow, *International Relations Theory: The Essentials* (SAGE, 2013)

³⁶ Ben Rosamond, *Theories of European Integration* (New York 2000), 33

³⁷ A. J. R. Groom & Paul Graham Taylor (eds.), *Functionalism: Theory and Practice in International Relations* (University of London Press, 1975), 1

experts,³⁸ but it is not clear who those experts who could provide solutions to international problems are.³⁹ This could therefore hinder the current study from clearly defining who as new actors can participate in the Security Council. Willets adds that experts could still be referred to certain groups who are not representative of individuals, thus making their use antidemocratic.⁴⁰ This also assumes that cooperation between states would bring peace, despite the fact that functionalism regards nationalism as objectionable. Even though it seeks to eliminate nationalism, it is paradoxically quite approbatory of states. This approach could therefore prevent the current proposals from criticizing the Security Council's state-based system. It also places too much emphasis on pragmatic cooperation, as it fails to provide for solutions when the relevant actors have no interests in common.⁴¹

According to Hassler, institutionalism could help identify both the factors that inhibit Council reform and how these factors should be eliminated.⁴² Institutionalism could in this regard provide an analysis of the Council's stability and efficiency in terms of political authority structures.⁴³ However, it also considers states as principal actors in much the same way as the realists' emphasis on the primacy of states.⁴⁴ It might therefore be unsuitable for the present purposes, as it would prevent this research from offering a solely non-state-based solution,

³⁸ Peter Willets, 'The Cardoso Report on the UN and Civil Society: Functionalism, Global Corporatism, or Global Democracy' (2006) 12 *Global Governance*, 305-324, 317

³⁹ *ibid*

⁴⁰ *ibid*

⁴¹ *ibid*

⁴² *ibid* and William J. Aceves, 'Institutionalist Theory and International Legal Scholarship' (1997) 12 *American University International Law Review* 227-276 and 241-252

⁴³ Kenneth W. Abbot, 'Symposium on Method in International Law: International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts' (1999) 93 *AJIL* 361

⁴⁴ Aceves (n.42) p.240 and Christer Jönsson & Jonas Tallberg, 'Institutional theory in International Relations' in Jon Pierre, Guy Peters & Gerry Stoker (eds.) *Debating Institutionalism* (Manchester Uni. Press, 2008)

and it would be inadequate to provide answers to questions regarding the contribution NGOs could make by participating in the Council. Likewise, institutionalism places too much emphasis on the positive role of institutions in creating the circumstances conducive to cooperation among state actors.⁴⁵ The focal point of the current study is of course the insufficiency of the Security Council and the positive role of NGOs.

The theory should sufficiently emphasize the role of NGOs' participation in the international decision-making process. In addition, it should serve the purpose of the current study by making arguments supporting formal access to the Council for NGOs. This research therefore incorporates the methods of the Principle of Maximum Effectiveness and CD.⁴⁶

There are three main theories on the interpretation of treaties: the teleological theory, the subjective theory and the textual schools.⁴⁷ According to Schweigman, the teleological approach indicates the significance of the object and purpose of a treaty. He states that the main assumption of this approach is to interpret a provision in a way that would best serve the object and purpose of the treaty even though such interpretation contradicts the original intentions of the parties. This theory allows "for gaps to be filled and texts to be interpreted liberally along the lines of the object and purpose of the treaty".⁴⁸ The teleological approach is generally incorporated with multilateral conventions of a general nature, such as the UN

⁴⁵ Aceves, op.cit., n.36)

⁴⁶ Harold Dwight Lasswell and Myres S. McDougal, *Jurisprudence for a Free Society: Studies in Law, Science and Policy* (New Haven Press, 1992) and Daniele Archibugi & David Held, 'Cosmopolitan Democracy: Paths and Agents' (2011) 25 *Ethics and International Affairs* 433

⁴⁷ David Schweigman, *The Authority of the Security Council under Chapter VII of the UN Charter: Legal Limits and the Role of the International Court of Justice* (Kluwer Law International, 2001), 10

⁴⁸ *ibid*

Charter. The current study also evaluates that Charter according to its stated purpose in charging the Security Council to maintain international peace and security. The subjective and textual approaches would prevent the current study from interpreting the Charter's current provisions as supporting the establishment of formal relationships between NGOs and the Security Council. The current study thus takes advantage of the teleological approach's possibilities of establishing such formal access without any Charter amendments. The current study argues that Article 29 of the Charter should be interpreted in such a way as to allow the elected members of the Council to set up a Consultative Committee for the UN Security Council. Neither the subjective nor the textual schools can provide for this interpretation.

In developing a practicable solution, the principle of maximum effectiveness encourages the author to apply the UN Charter's current articles and rules in the best possible way so as to provide for the implementation of the solution arrived at in the present research.⁴⁹

Schweigman states that

*as regards international institutional law, in case of gaps or ambiguities in a constituent instrument, this school emphasizes the need for the effective functioning of an organization rather than the sovereignty of its members.*⁵⁰

This implies the Principle of Maximum Effectiveness (*la regie de l'effet utile*).⁵¹ Schweigman details two assumptions underlying this principle. The first is that each provision is included for a reason, so no provision should be considered as redundant. This also considers that "it is

⁴⁹ n47

⁵⁰ *ibid*, 10

⁵¹ *ibid*

better for a thing to have effect than to be void”.⁵² The second is that a provision should be interpreted in the light of the purpose of the instrument as a whole.

Miretski applies the maximum effectiveness principle to Article 2(6) of the UN Charter in order to grant a legal personality to non-state actors.⁵³ The current study posits that this article can be used to grant NGOs formal access to the UN Security Council, arguing that Article 29 could be used to establish a permanent CCSC (Consultative Committee of the Security Council) that would have similar functions to those of Article 71, which provides for consultative status for NGOs. In fact, no such body has been established under that article 29, which could thus be interpreted by the maximum effectiveness approach as eliminating any possible negative reactions that could be based on legal provisions.

Finally, as the current research concerns the development of a more democratic Security Council, CD provides significant insights with which to justify the desirability of democracy in the Council’s system. CD emphasises that all individuals affected by decisions should have the right to participate in that system’s decision-making process. It allows the definition of a demand for the development of a more democratic Council and describes grounds for a response to the question of why this demand for NGOs’ participation is so important. CD has played a significant role in identifying possible benefits of the proposed solution. In short, the

⁵² *ibid*

⁵³ “...why should we not interpret Article 2(6), which may already be part of a binding customary international law, as allowing the UN to ensure that all non-members (and not just states), concur on the principles of the Charter in the purpose of maintenance of the international peace and security?” Miretski (2009)

advocates of CD⁵⁴ have contributed significantly to the author's arguments regarding the Council.

The present research has also benefited from two other theories: Deliberative Democracy⁵⁵ and Liberal International Theory.⁵⁶ Although they do not fully fit the purposes of the current research,⁵⁷ they are to some extent relevant and supporting theories for the analysis and solution it proposes. Both of these theories are relevant because they also devote considerable attention to the participation of NGOs in the decision-making process. As they also encourage such participation, they broaden the present study's potential reference base in order to make its arguments stronger and more convincing. On the other hand, despite their eagerness to highlight the significance of NGOs' participation, neither Deliberative Democracy nor Liberal International Theory goes as far as criticizing the state-based system. They are also deficient in not adopting a progressive approach and in their suggestion that the use of military force be minimized. Those Council resolutions adopted pursuant to the activity of NGOs are used to support the current research's possible outcomes and the feasibility of the solution it offers.

The shape of this proposal's methodology is flexible, which means that it could generate new strategies depending upon the exploration of new ideas and the nature of the research. In that regard, the thesis initially attempted to employ other methods such as interviews and

⁵⁴ Including Daniele Archibugi and Boutros Boutros-Ghali

⁵⁵ Patrizia Nanz and Jens Steffek, 'Global Governance, Participation and the Public Sphere' (2004) 39 *Government and Opposition*, 314-335.

⁵⁶ Andrew Moravcsik, *Liberalism and International Relations Theory* (Harvard Uni. 1992), p.1 and Jan Aart Scholte, 'Civil Society and Democratically Accountable Global Governance' (2004) 39 *Government and Opposition*, pp.213-214

⁵⁷ This point is evaluated in Chapter II.

questionnaires.⁵⁸ It was hoped that the interviews would cover the staff of international organisations, the heads of NGOs, diplomats, foreign ministers, experts and political parties in order to understand the possibilities for granting formal access for NGOs. However, both the interview and questionnaire approaches were rejected⁵⁹ because they were not necessary to the present study's theoretical purpose and because of the significant time involved. The main research method has therefore been academic. The thesis's approach has been to identify and use the relevant literature, ranging from books and journal articles through UN documents to Web material. The use of multiple sources and a wide variety of literature ensures that the subject is not dealt with from one view only. Identifying existing literature also means that the current study can build on and add to existing work rather than merely recapitulating extant knowledge.

To sum up, the current study has adopted the theories that support its purposes, the main one being to grant formal access for NGOs to the Security Council in order to democratize it. The theories that have been found to be helpful in this regard are the Maximum Effectiveness Principle of the Teleological School and CD. The Maximum Effectiveness Principle allows a broad interpretation of the UN Charter in order to circumvent any objection to its amendment. CD's provision of supporting arguments, reasons and evaluation has been significant, and Deliberative Democracy and Liberal International Theory are both used further to enrich that base.

⁵⁸ Questionnaires were regarded as an alternative to interviews, which could on occasion be harder and more expensive to arrange

⁵⁹ Only one interview was held with Sir Jeremy Greenstock, Chairman of the UN Association in the UK, United Nations Association-UK (London 21 November 2013)

1.5 Layout of the Study

The thesis will be organized as follows. Chapter II offers some background material regarding the theoretical framework and democracy in the international legal order. It first highlights the realities of the post-Westphalian era by discussing its origins. It provides insights into the transformation of the international legal order from the Westphalian to the post-Westphalian order. As CD indicates, this section also explains the emergence of new problems and new actors that cannot be ignored, suggesting that they should be taken into account in the decision-making process. This chapter underlines changes that have taken place in the international realm after the establishment of the UNSC and provides reasons for the participation of NGOs in the Council. It outlines the circumstances in which states are no longer the only actors in the international legal order, and how they are not able to cope with the new problems of present world conditions. It suggests that the UNSC must begin to face the realities of the post-Westphalian order by granting formal participation rights to NGOs, citing changing facts as compelling reasons for such participation. It therefore supports the proposal that a reform project would be quite insufficient without considering the new actors in the international legal order.

It also backgrounds the current situation regarding democracy in the international realm. The first section of Chapter II thus provides an opportunity to develop the argument and describes what is meant by a more democratic UNSC. This study seeks to find the way of making the UNSC, as an international entity, a more democratic body. The author must therefore delineate the general view of democracy in international law. The growth and decline of the democratic deficit in the international legal order is discussed. It is helpful to analyse the state

of democracy in the context of the UNSC in order to estimate more accurately the chance of developing a more democratic SC. Chapter II charts some of the main themes underlying the debate on whether international organisations could be democratized and what conditions must be met in order for an international organization to be democratic, before concluding that democracy cannot be limited to national boundaries. The chapter also determines where the UNSC itself stands in this debate. Finally, it argues that it is possible to democratize the UNSC and presents findings that demonstrate why and how the UNSC should be a more democratic entity. The second section of the chapter introduces the CD theory as it applies to the thesis. The choice of CD is justified on the grounds that it is the most suitable theory for the purposes of the present research. Critics and alternative theories are also discussed.

Chapter III aims to diagnose the problem of the UNSC by discussing some specific articles of the UN Charter. It reaches a different conclusion from most other commentators: namely that the permanent members of the UNSC are not the only culprits. It is followed by a description of the UNSC's main problem: its state-centric nature and structure, a critique of which is presented. It examines the Council's state-centric system from a CD perspective, explains why the UNSC's state-based system is no longer suitable for the current world order, criticizes the UNSC's state-centric system by emphasising the problem of its hypocrisy and elucidates the reasons behind the proposal for the formal participation of NGOs.

Chapter IV highlights the role of NGOs as important actors as it describes their contributions and roles in the international legal order. This section also portrays their *de facto* and *de jure* status in that environment. This chapter helps explain why it is that NGOs are singled out for this role, and it develops a definition of NGOs for the purposes of this study.

Chapter V presents an overview of the informal relations that have been developed between NGOs and the UNSC to date, as well as revealing the circumstances that lead to such relationships being founded. Chapter VI evaluates these informal relations and concludes that such informality is not sufficient, outlining the practical difficulties attendant on this lack of formal identity. Chapter VII introduces a general framework for possible formal relations between NGOs and the Council and also outlines some concerns in this regard. Chapter VIII projects the possible outcomes of formal participation of NGOs by examining the informal relations that exist. Finally, Chapter IX predicts and evaluates objections and difficulties in implementing this proposal.

CHAPTER TWO

The Transformation of the International Legal Order and Theoretical Framework

2.1 Facing the Realities of the Post-Westphalia Era⁶⁰

In the rapidly changing world following the end of the Cold War and the demise of the Soviet Union⁶¹, it has been argued that the state-centered system no longer represents the circumstances of the current world order. There may not be a treaty of similar importance to that of Westphalia to mark the birth of a new international legal order that involves non-state actors. Yet the new era has been marked by several significant developments such as an intensification of globalization, the Third Wave of global democratization and the rise of transnational social movements.⁶² Mattias Kumm maintains that “contemporary international law has expanded its scope, loosened its link to state consent and strengthened compulsory adjudication and enforcement mechanisms”.⁶³ Ferguson and Mansbach maintain that the Westphalian era has passed and that the end of the Cold War has undermined states’ roles as

⁶⁰ The concept ‘Post-Westphalian’ was first propounded by Falk (1998) Other scholars have also used this concept, while some prefer to use that of ‘Westphalia II’. See for example Kimon Valaskakis, ‘Westphalia II: The Real Millennium Challenge’ (2000) <<http://www.paricenter.com/library/papers/valaskakis01.php>> See: Kemal Baslar, *Uluslararası Hukukta Hukümet Disi Kuruluslar (Non-state Actors in International Law)* (Ankara, 2006)

⁶¹ Christine Drake, ‘The United Nations and NGOs: Future Roles’ in George J. Demko and William B. Wood (eds), *Reordering the World: Geopolitical Perspectives on the Twenty-first Century* (Westview Press, 1999) p.243

⁶² Anthony McGrew, ‘Transnational Democracy: Theories and Prospects’ in April Carter & Geoffrey Stokes (eds) *Democratic Theory Today: Challenges for the 21st Century* (Polity Press, 2002)

⁶³ Mattias Kumm, ‘The Legitimacy of International Law: A Constitutionalist Framework of Analysis’ (2004) 15 EJIL, pp.907-932, p.907

a consequence of this global trend.⁶⁴ They aptly believe that “the current erosion of state authority and capacity signals that the interstate epoch is drawing to a close, and invites us to reexamine old ideas and construct new ones that will both provide a better fit with observable reality and a more accurate guide to changing political patterns and attendant norms”.⁶⁵ It is thus clear that new international developments have been alerting the international legal system to necessity of adopting new realities of world order.

Globalization has propelled many new issues onto the international agenda, such as a lack of deliberative democracy, international justice⁶⁶, a universal constitution⁶⁷, a world parliament⁶⁸ and the principles of *erga omnes*, *jus cogens* and subsidiarity.⁶⁹ The development of NGO activity in the international field accordingly demonstrates the emergence of international civil society.⁷⁰ Holly and Karen state that “such activity has accelerated in several areas, notably environment and human rights, and the integration of NGOs into the implementation of international law, particularly of multilateral treaties, indicates a socialization of international law, and more importantly, the beginnings of

⁶⁴ Yale H. Ferguson & Richard W. Mansbach, *Remapping Global Politics History's Revenge and Future Shock* (CUP, 2004), p.1

⁶⁵ *ibid* p.4

⁶⁶ Archibugi (2008), p.105-106

⁶⁷ “...constitutional trends that are beginning to emerge outside of the nation state ...” See Laurence R. Helfer, ‘Constitutional Analogies in the International Legal System’ (2003) 37 *Loyola of Los Angeles Law Review*, pp.193-237, p.237

⁶⁸ Archibugi (2008), p.172

⁶⁹ “...The principle of subsidiarity ought to be an integral feature of international law...” See: Kumm (2004) p.921

⁷⁰ Holly Cullen & Karen Morrow 'International Civil Society in International Law: The Growth of NGO Participation' (2001) 1 *Kluwer Law International* pp.7-39, p.7

pluralism in international law, where states are not the only actors which can influence the progressive development of international law”.⁷¹

Johan Galtung pertinently cautions: “states beware: as other key actors (NGOs, TNCs, and LAs)⁷² catch the linkage between globalization and democracy while states fail to do so, and the state system overdoes Westphalian sovereignty (350 years are enough!), these other systems may overtake and pass the state system as carries of the popular will”.⁷³ The world has become a much more polycentric place than it was in 1945.⁷⁴ In addition, the UNSC has also been facing significant new problems in the international arena that states cannot solve on their own.⁷⁵ Those new developments can consequently be considered as exerting significant pressure on the Security Council not to simply remain wedded to the state-based Westphalian system.

Jost Delbruck states that “the monopoly of the state as a political actor in the international system has been entirely broken”.⁷⁶ In the post-Westphalian era the gradual diminution of nation-states’ powers has led to the emergence of supranational actors such as the EU, NAFTA and the WTO, sub-national actors including Puerto Rico, Greenland, Quebec and

⁷¹ The authority of the state in the international system has been broken. See Jost Delbruck, 'Prospects for a "World (Internal) Law"?: Legal Development in a Changing International System' (2002) 9 *Indiana Journal of Global Legal Studies*, p.410 and *ibid*

⁷² NGOs: Non-Governmental Organizations, TNCs: Transnational Corporations, LAs: Local Authorities

⁷³ Johan Galtung, 'Alternative Models for Global Democracy' in Holden (2000) p.159

⁷⁴ Philip Alston, 'The 'Not-a-Cat' Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?' in Philip Alston (ed.), *Non-State Actors and Human Rights* (Oxford, 2005), pp.3-36, p.4

⁷⁵ Peter Wilenski, 'The Structure of the UN in the Post-Cold War Period' in Adam Roberts & Benedict Kingsbury (eds.) *United Nations, Divided World: The UN's Roles in International Relations* (OUP 2nd ed., 1993), pp.437-467, p.439; n 71, p.408

⁷⁶ Delbruck (2002) p.410

Hong Kong, non-state actors such as the Tibetan government in exile and private military companies, NGOs like Greenpeace and Amnesty International⁷⁷ as well as transnational actors such as Interpol, Médecins Sans Frontières,⁷⁸ the Inter-Parliamentary Union (IPU), the International Organization for Standardization (ISO) and the International Olympic Committee (IOC). The horizontal structure of international law is changing with the introduction of new actors at the vertical level.⁷⁹ The emergence of non-, sub- and supra-state actors has seen international relations develop vertically, which is to say in a multilayered and pluralist fashion, heedless of sovereignty and territorial factors. Various networks formed by sovereign-free actors for effective global governance should be brought together in the 21st century as the monolithic model crumbles with the appearance of new actors. Thus, as Carol Gould rightly suggests that “no forward-looking democracy theory can claim to be complete without considering these important new domains”.⁸⁰

Moreover, the concept of governance according to which states and non-state actors hand-in-hand shape the process by which international law is formulated has replaced the state-centric conception of “government” which has hitherto formed the cornerstone of the old horizontal system. Another novelty of the post-Westphalian order is the introduction of the concept of democracy to the international level. The concept of “transnational democracy” is often

⁷⁷ *ibid*

⁷⁸ Oliver James Lissitzyn, *Territorial Entities Other Than Independent States in the Law of Treaties* (Hague Academy of International Law, 1968) and *ibid*

⁷⁹ Falk sees the international system after peace of Westphalia as the “transition to horizontal inter-State model”. Richard Falk, ‘The Interplay of Westphalia and Charter Conceptions of International Legal Order’ in Richard Falk and Cyril Edwin Black (eds), *The Future of the International Legal Order: The Structure of the International Environment* (Princeton University Press, 1969)

⁸⁰ Carol C. Gould, ‘Regional Versus Global Democracy: Advantages and Limitations’ in Daniele Archibugi, Mathias Koenig-Archibugi & Raffaele Marchetti (eds.) *Global Democracy: Normative and Empirical Perspectives* (CUP, 2012), p.116

referred to by academics and politicians. The large number of innovations, both inside and outside the UN, concerning the democratization of the process by which international law is formulated emanates from the participation of non-state actors in international law and politics.

The facts of globalization and global democracy have significantly increased their effects in the post-Westphalia era, so NGOs have been in the ascendancy in international law. Christine Drake argues that, even though “nationalistic feelings are becoming much stronger, and tensions among peoples, ethnic groups, tribes, and even clans are boiling over into open conflict”, yet, “national boundaries have become more permeable, and national sovereignty less sacrosanct”.⁸¹ She aptly adds that the concept of the nation-state has begun to be considered as an obstacle to the maintenance of international peace and security,⁸² so that, even though strives to restrain the development of new trends in the international legal order, it cannot escape debilitation.

Charnovitz is arguing that “although the State-centric view continues to pervade international law, this dogma is losing coherence”.⁸³ He attributes this to a significant rise in the number of states, their increasing heterogeneity⁸⁴ and the decrease in incompatibility between natures of

⁸¹ Drake (1999) p.243

⁸² *ibid*

⁸³ Steve Charnovitz, ‘Two Centuries of Participation: NGOs and International Governance’ (1997) 18 *Michigan Journal of International Law*, pp.183-286, p.277

⁸⁴ “After all, how much commonality really exists between China and the Marshall Islands? Are they both “powers,” to use the old term for participants in international conferences?” *ibid*

states and NGOs.⁸⁵ In a similar vein, Nicolas Politis postulates that “international law is in a transition period – no longer exclusively the law of States, but not yet completely the law of individuals”.⁸⁶ While NGOs may not yet have gained formal recognition in international law, they have already brought about a practical change in the structure of traditional international law.

The horizontal structure of international law has been degraded by the entrance of new actors in the international legal order. As mentioned, the WWO is single-layered, monolithic and territorial. A state’s ability to control a geographical area automatically entails its control of the political power within that territory’s boundaries.⁸⁷ International law is seen as rules governing states in a world where each state has a border and equal rights.⁸⁸ Yet the existence of NGOs has engendered the development of vertical relationships, as a result of which international law has significantly evolved a vertical dimension. Schreuer maintains that “there is mounting evidence that the process of redistributing authoritative functions will continue and that the vertical element in a preponderantly horizontal order will continue to grow”.⁸⁹ International law, in other words, could develop both horizontally and vertically.

⁸⁵ NGOs have also acquired some of the characteristics of states, such as permanent populations of dedicated members and the capacity to conduct international relations. *ibid*

⁸⁶ Nicolas Politis, *The New Aspects of International Law: A Series of Lectures Delivered at Columbia University in July, 1926* (Carnegie Endowment for International Peace, 1928) p.30 cited in Charnovitz (1997)

⁸⁷ Christoph Schreuer, ‘The Waning of the Sovereign State: Towards a New Paradigm for International Law?’ (1993) 4 EJIL p.447

⁸⁸ Baslar (2006) pp.252-254

⁸⁹ *ibid* p.453

There has been a significant increase in transnational relationships that have led to the emergence of many actors.⁹⁰ International law has thus shifted its emphasis to the vertical.

To illustrate this point, entities such as non-state, supranational and sub-national ones can act independently of states in decision-making and in practice. Examples include Belgium's Flemish and Walloon regions, the Canadian province of Quebec, Chechnya in Russia, Scotland and Wales in the UK and Spain's Basque and Catalan regions. Such sub-national geographical regions as Scotland, Wales, the Basque region and Catalonia could have direct and official relations with the central organs of the EU.⁹¹ Therefore, "the horizontal multiplicity of actors and their vertical interconnectedness has made classical concepts of the structure of the international system obsolete"; international relations as the exclusive domain of states is no longer a valid concept.⁹²

Moreover, the advisory opinion of the ICJ in the case of *Reparation for Injuries Suffered in the Service of the United Nations* on 11 April 1949 provides that "...the Organization is an international person. It is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims".⁹³ This decision amounts to an acknowledgement that an international organization can have a legal personality in international law. In that respect, it is a recognition of new actors alongside states in international law.

⁹⁰ Jost Delbruck, 'Transnational Federalism: Problems and Prospects of Allocating Public Authority Beyond the State' (2004) 11 *Indiana Journal of Global Legal Studies*, pp.31-55, p.46

⁹¹ Spiro (1997), pp. 31-32 and *ibid*

⁹² Delbruck (2002)

⁹³ See: *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion: I.C. J. Reports 1949, p. 179

By contrast with current conditions, the monitoring and preservation of individual rights within a state's borders was prohibited by the Treaty of Westphalia, which guaranteed not to interfere in the domestic affairs of sovereign states. This was main thrust of the Treaty, which made states free of responsibility for their internal behavior, thus allowing them to enjoy plenary authority within their boundaries.⁹⁴ This is not valid for the current world order, however, since the majority of states do not have unlimited authority over their citizens. In addition, the notion that state governments are no longer their citizens' sole representatives has become increasingly popular.⁹⁵ Global civil societies therefore endeavor to establish independent non-state entities to maintain their interests, as they increasingly no longer believe that states are the proper agents working for their benefit.⁹⁶ Steven Schneebaum argues that "none of this is conceivable in a world governed by the Treaty of Westphalia: all of it presupposes the demise of that regime".⁹⁷ These trends serve as alerts to the unfitness of the WWO to the current demands of the international legal order.

The most significant feature of the post-Westphalian era is that states have been losing their control of international relations and of innovations and developments.⁹⁸ Multinational enterprises and transnational corporations have begun to be influential in international legal decision-making processes.⁹⁹ In fact, states' determinations of their national economic

⁹⁴ Steven M Schneebaum, 'Ethnic Groups and International Law: A Status Report on International Legal Personality at the Beginning of the New Century' (2004), p.13

⁹⁵ *ibid*

⁹⁶ Baslar (2006) p.69

⁹⁷ Schneebaum (2004)

⁹⁸ Baslar (2006) p.70

⁹⁹ Jurgen Kurtz, 'NGOs, the Internet and International Economic Policy Making: The Failure of the OECD Multilateral Agreement on Investment' (2002) 3 Melbourne Journal of International Law, pp.213-246, 243, Oscar Schachter, 'The Decline of the Nation-State and Its Implications for International Law' (1997) 36 Columbia Journal of Transnational Law, pp.7-24 and *ibid*

policies have been giving way to the preferences of multinational corporations.¹⁰⁰ For this reason, states have considered the interests and wishes of profit-oriented corporations as far outweighing their own citizens' demands,¹⁰¹ so that their dependence on multinational corporations forces them to shape their policies in accordance with those wishes and interests rather than those of their own people. The international system has eventually developed a new mechanism to fight the corporations' dominance: non-profit NGOs and civil social actors have begun to play an important role in reducing the impact of multinational corporations on national policies.¹⁰²

For example, protests that occurred after NGOs waged an intense global campaign against the Multilateral Agreement on Investment (MAI) prevented its adoption.¹⁰³ The same has occurred regarding the NGOs' campaign against the planned EU agreements with Canada (the Comprehensive Economic and Trade Agreement (CETA)) and the US (the Transatlantic Trade and Investment Partnership (TTIP)).¹⁰⁴ NGOs are concerned that these agreements pose a threat to democracy, as they would involve a further transfer of power from nation-states to corporations. They believe that such agreements would influence governments to take decisions that are not in the public interest. Such example demonstrates that nation-states are alone no longer the sole representatives of the public good in the post-Westphalian era, and that individuals have been motivated to collect under the umbrella of NGOs to make their wishes for their futures felt.

¹⁰⁰ Robert W. Cox, *Approaches to World Order* (CUP, 1996), pp.154-155.

¹⁰¹ Baslar (2006) p.70

¹⁰² *ibid*

¹⁰³ *ibid*

¹⁰⁴ <https://stop-ttip.org/what-is-the-problem-ttip-ceta/> accessed on 06/06/15

In short, there are four key aspects of the new world order: the introduction of innovations such as the Internet, the increased influence of new non-state actors, the rise of new problems and the loss of states' traditional dominance. As the Security Council is the mainly state-centric entity responsible for maintaining international peace and security, it is inconceivable that it does not take these developments into consideration.

2.2 Overview of Democracy in the Context of International Law

“Suppose you were living in a village of thirteen people. You and your neighbours elected one person to be the mayor of your village, and made virtually all public decisions by referendums allowing your mayor to put your decisions into action. You would invariably manage few resources, and exert little power on the communities around you; however, you would have a substantial degree of control in your affairs. Now suppose you moved to a village of approximately 7 billion. You now have a village council, a mayor, a local representative, a governor, a national representative, a president or prime minister, and an international representative. There are thousands of issues decided each day, some of these are legislative issues bound to become laws, some judicial decisions that will have legal bearing - all will affect you and your life. Consequently, the degree of control you can exert over your own affairs has virtually evaporated. What happened to the spread of liberal democracy? In a world where the theory of a "global village" is increasingly and increasingly convincingly being advanced, international law theoretically also becomes increasingly necessary - this global village is interdependent, and thus there must be universality to the laws.”(Gautner)¹⁰⁵

The Westphalian system of international law has never heeded the democratic legitimacy of states.¹⁰⁶ That order has therefore never had a democratic purpose. States limited democracy within their borders, so democracy had been an unfamiliar concept in international law for a

¹⁰⁵ Gregory H. Fox & Brad R. Roth, *Democratic Governance and International Law* (CUP, 2000)

¹⁰⁶ “...a government in effective control of a territory is generally accepted as the representative of the population within that territory, even if it has assumed power through violent or otherwise undemocratic methods.” Anna-Karin Lindblom, *Non-Governmental Organizations in International Law* (CUP, 2005), p.6

long time.¹⁰⁷ The most important subjects were states, and international law was regarded as concerning only affairs between states, not within them. The result was that a state was unlikely to be judged for any aspect of its behaviour under international law. Because international law was based on the classical concept of sovereignty, “states were given *carte blanche* to choose their own polity”.¹⁰⁸ Of course, they used this opportunity to disregard democracy in order to forestall what they regarded as its pernicious effects on their behaviour for which they would not be held to account. Consequently, the ruling elites who regulated international law had enjoyed the benefits of neglecting democracy.

In fact, traditional international law did not concern itself with the democratic character of sovereign states, as democratic governance was not a principle of statehood.¹⁰⁹ In this regard, Roland Rich points out that “the word ‘democracy’ does not appear in the Charter of the United Nations, nor was it mentioned in the Covenant of the League of Nations”.¹¹⁰ By requiring all states to approve its obligations, the UN Charter did not require its members to adopt a model of democratic governance.¹¹¹ No standard textbooks on international law

¹⁰⁷ “Traditionally, international law has barely paid attention to the democratic legitimacy of its most important subjects – states –, having been concerned only with relations between states and not within them.” Jan Wouters, Bart De Meester & Cedric Ryngaert, *Democracy and International Law* (2003) 34 *Netherlands Yearbook of International Law*, pp.139-197

¹⁰⁸ N 158, p.4

¹⁰⁹ Article 1 of the Montevideo Convention on the Rights and Duties of States sets out the criteria for statehood: a) a permanent population; b) a defined territory; c) a government; and d) the capacity to enter into relations with other states. See Varayudej, ‘A Right to Democracy in International Law: Its Implications for Asia’ (2010) 12 *Annual Survey of International & Comparative Law*, p.4

¹¹⁰ Roland Rich, ‘Bringing Democracy into International Law’ (2001) 12 *Journal of Democracy*, pp.20-34, p.20.

¹¹¹ In contrast to the UN, the EU requires many standards for states to become members. It also monitors its members for compliance with the organisation’s obligations. Yet these obligations are quite different from those implied by the UN’s Article 4(1): “Membership in the United Nations is open to all other peace-loving states

include chapters on democracy.¹¹² Neither has the International Court of Justice regarded the legal application of democratic principles in its decisions. There have, however, been some attempts to make democracy a norm of international law.¹¹³ US President Woodrow Wilson said that “the world must be made safe for democracy” when clarifying his aims upon the USA’s entry into World War I.¹¹⁴

The defeat of fascism after World War II presented the international community with the opportunity to make democracy a norm of international law. With this in mind, some tentative steps were taken in describing “certain civil and political rights” and also in drafting the “consultative instruments of several international organizations”.¹¹⁵ It might well be concluded that “this formative period of modern international law did indeed plant the idea that democracy is an essential element of human rights, but the Cold War intruded far too quickly for the notion to take root in international law”.¹¹⁶ Democracy had thus arrived as an idea whose realisation should at least be attempted, even though the circumstances did not allow its full development.

By contrast with the UN Charter, some post-war international treaties directly espouse democracy. UNESCO was established for the purpose of contributing to peace and security

which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.” N 158 p.4

¹¹² *ibid*

¹¹³ *ibid*

¹¹⁴ ‘Making the World “Safe for Democracy”: Woodrow Wilson Asks for War’
<<http://historymatters.gmu.edu/d/4943/>> accessed on 25/2014

¹¹⁵ *ibid*, p.21

¹¹⁶ *ibid*

by promoting collaboration among nations in the spheres of education, science and culture.¹¹⁷

The preamble to its constitution refers to democracy by stating that “the great and terrible war which has now ended was a war made possible by the denial of the democratic principles”.¹¹⁸

Democracy also appeared in Article 29(2) of the 1948 Universal Declaration of Human Rights. The Article refers to “...recognition and respect for meeting the just requirements of morality, public order and the general welfare in a democratic society”.¹¹⁹ At the same time the preamble to the constitution of the Organization of American States (OAS) also expresses itself “...convinced that representative democracy is an indispensable condition for the stability, peace and development of the region”.¹²⁰ The preamble of the 1949 Statute of the Council of Europe sees its members as “reaffirming their devotion to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy”.¹²¹ Roland Rich believes that “the use of the qualifier *genuine* is an early indication of the contestation over ownership of the term democracy”.¹²² However, there does not seem to have been a general endorsement of the democratic principle under international law outside treaties.¹²³

¹¹⁷ Article 1(1) of the UNESCO Constitution

¹¹⁸ Constitution of the United Nations Educational, Scientific and Cultural Organization (UNESCO), Preamble

¹¹⁹ The Universal Declaration of Human Rights, Article 29

¹²⁰ The Charter of the Organization of American States, Preamble, Para 3 <http://www.oas.org/dil/treaties_A-41_Charter_of_the_Organization_of_American_States.htm> accessed on 26/05/2014

¹²¹ 1949 Statute of the Council of Europe, Preamble

¹²² *ibid*

¹²³ James Crawford, ‘Democracy and International Law’ (1993) 64 The British Yearbook of International Law, pp.113-133, p.116

The general character of traditional international law did not take the “will of the people” into account being instead based undemocratically on “sovereignty”. James Crawford maintains that general classical international law’s features were deeply undemocratic,¹²⁴ describing its six aspects as follows.¹²⁵

*Firstly, the executive has comprehensive power to agree and apply rules of international law which may affect the rights of individuals without their consent and even without their knowledge.*¹²⁶ For example, the heads of states and foreign secretaries or their equivalents generally have plenary powers to make international commitments on behalf of the state. Even if the government were to come to power with 75 per cent of the popular vote, one quarter of the population would be unrepresented by that government’s foreign policy. In fact, the 75 per cent might very well also disagree with foreign policy decisions.¹²⁷ Once individuals express their concern that their consent is not taken into account, they might seek alternative ways of expressing their opinions. One reason for the existence of NGOs and their increasing role in international affairs is that they have been regarded as a significant alternative forum in which individuals can voice their views.

¹²⁴ *ibid*, p.117

¹²⁵ *ibid*, pp.117-119

¹²⁶ Vienna Convention on the Law Treaties, 23 May 1969: UN Treaty Series, vol.1155, p131, Article 7(2)

¹²⁷ See for example American citizens’ views about America foreign policy: “As for Mr. Bush, 23 percent approve of his handling of the situation in Iraq, 72 percent disapprove; 25 percent approve of his handling of foreign policy, 65 percent disapprove; and 27 percent approve of his handling of immigration issues, while 60 percent disapprove.” Dalia Sussman, ‘Poll Shows View of Iraqi War is Most Negative Since Start’ (25 May 2007) The New York Times,

<http://www.nytimes.com/2007/05/25/washington/25view.html?_r=2&oref=slogin> accessed on 14/01/2015

*Secondly, it does not matter how democratically a national law is established. A state cannot make its national law an excuse for refusing or failing to comply with international obligations.*¹²⁸ In the current global order, a state's national behaviour can have a significant impact on the rest of world. For example, the Ukraine crisis has negatively affected international politics, particularly in Europe. Broadly speaking, the Russian government has apparently put its national concerns before those of international law, causing an ongoing crisis that has adversely affected other regions. The impact of the crisis has been felt by people across the globe via Internet news and other networks. The ongoing Syrian crisis could not have been resolved because of conflicts between the states with interests in the crisis. If all interested states would first consider international rules rather than their perceived national interests, an effective resolution would be eminently possible.

Thirdly, while the executive government has virtually exclusive control over the availability of international remedies, individuals have no legal standing and autonomous procedural rights in international law. This is an essential point, but it has weakness as well as strengths. First, it is necessary to provide some privileges to executive government regarding its security and official work. Otherwise, the execution of their policies might become impossible if they proved unwelcome to extremist or other antagonistic groups. Secondly, the absence of legal sanction for its work would make it very hard for it to fulfil that work efficiently. On the other hand, individuals should also be able to benefit from similar international remedies as far as possible.

¹²⁸ Article 27 of the Vienna Convention on the Law of Treaties explicitly indicates that “a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty”.

Fourthly, the principle of non-intervention protects even non-democratic regimes. However, attempts to solve a mistake with another mistake are obviously flawed. Non-democratic regimes might pose a significant issue that must be dealt with. On the other hand, intervention is quite problematic: most such actions have failed to improve the situation; on the contrary, they have generally made it worse. In fact, there have been several examples of intervention in the affairs of non-democratic governments, implying that the principle of traditional international law was violated on those occasions. The well-known Iraqi invasion of 2003 concerned an anti-democratic government, but the international community has borne sad witness to how this intervention made the situation worse. *Fifthly, the principle of self-determination is not able to modify established territorial boundaries uti possidetis juris.*¹²⁹

Sixthly, a successor government is responsible for those responsibilities of its predecessor that emanate from its acts. For example, a military regime in Costa Rica seized power but was eventually overthrown and replaced by an elected government that refused to pay the debts incurred by its predecessor. After the case went to arbitration, it was held that the successor government was bound by all the acts of its predecessor, on the basis that the previous regime was firmly established, and that its legitimacy or constitutionality were irrelevant.

Nevertheless, this trend has begun to change after the Cold War: the world has begun a remarkable shift towards democracy after the collapse of Soviet Union. Consequently, now that democracy has become a significant consideration, international organizations and

¹²⁹ For example, the principle of self-determination was ignored in Africa and Central America under the name of stability.

instruments have also been challenged on their democratic credentials.¹³⁰ Gregory Fox and Brad Roth state that “prior to the events of 1989-1991, 'democracy' was a word rarely found in the writings of international lawyers” and that there were few international organisations that supported democratic governance.¹³¹ The traditional attitude was that international law said little about the way in which governments were selected. The post-Cold War democratic revolution has profoundly shaken old assumptions of international law,¹³² which has consequently been deployed to foster transitions to democracy and “to justify the armed expulsion of military juntas that overthrow elected regimes” in the 1990s.¹³³

Given this reality, it can be observed that international law has entered a new era of globalization, and that the path to a more democratic global world is an ongoing process, not a straightforward leap. Significant changes in the international realm have been followed by questioning the “democratic deficits” of international organizations and instruments. In this regard, some commentators raise questions regarding whether “global governance and the structure of international institutions [are] democratically legitimate, or [whether they] suffer from a democratic deficit”.¹³⁴ This is emerging as perhaps one of the central questions in contemporary world politics.¹³⁵ The legitimacy of international law has therefore become a central concern.¹³⁶ Contemporary critiques of international law may have taken a variety

¹³⁰ Fox & Roth (2000), p.1.

¹³¹ *ibid*

¹³² *ibid*

¹³³ *ibid*

¹³⁴ Andrew Moravcsik, ‘Is there a ‘Democratic Deficit’ in World Politics?: A Framework for Analysis’ (2004) 39 *Government and Opposition*, pp.336-363, p.336.

¹³⁵ *ibid*

¹³⁶ Kumm (2004), p.907.

forms,¹³⁷ but leading students of international law have begun to suggest that it is suffering from a crisis of legitimacy,¹³⁸ the conclusion of international organizations being that "they suffer from a severe democratic deficit".¹³⁹

The issue of democracy has been of growing concern in international law. While Thomas Franck could say before the fall of the Berlin Wall: "yet, oddly, almost no one, nowadays, seems to ask this type of fundamental teleological question¹⁴⁰ of the international system",¹⁴¹ this observation has been nullified by questions about the democratic deficit in international law. There was a clear victory for "liberal democracy" after the end of the Cold War in the early 1990s.¹⁴² This was considered as the triumph of democracy that implied the demise of communism, fascism and other ideological anti-democratic forces.¹⁴³ After the victory of liberal democracy, international scholars began to believe in a right to democracy as a new human right to be considered among international human rights law and as an influential principle in most fields of public international law.¹⁴⁴ Thomas Franck maintains that "democracy is beginning to be seen as the *sine qua non* for validating governance".¹⁴⁵ A

¹³⁷ Ibid pp.907-908.

¹³⁸ J.H.H. Weiler, 'The Geology of International Law – Governance, Democracy and Legitimacy' <http://www.zaoerv.de/64_2004/64_2004_3_a_547_562.pdf> and Ibid p.908

¹³⁹ N 193

¹⁴⁰ This type of fundamental teleological question refers the 'legitimacy of international law' n 195.

¹⁴¹ Thomas M. Franck, 'Why a Quest for Legitimacy?' (1987-88) 21 Davis Law Review, pp.535-548, p.535.

¹⁴² Francis Fukuyama, *The End of History and the Last Man* (New York, 1992) and Varayudej (n110), p.6.

¹⁴³ Varayudej p.6.

¹⁴⁴ Ibid

¹⁴⁵ Thomas M. Franck, 'The Emerging Right to Democratic Governance' (1992) 86 AJIL, pp.46-91, p.46.

major debate has consequently arisen among international lawyers and political scientists regarding the relationship of democracy and international law.¹⁴⁶

Globalisation's impact on international relations has resulted in democracy beginning to become a principle of international law. In this regard the recognition of new states has also increasingly depended on their commitment to the construction of a democratic polity.¹⁴⁷ The provision of democracy by globalization refers to the relationship between democracy and globalization.¹⁴⁸ The main actors in this relationship are NGOs, which have come into being pursuant to the lack of representativeness of states or international organizations. Individuals consider that these political entities cannot accurately represent their interests, so NGOs have developed in order to represent and support those interests.¹⁴⁹ Globalization has paved the way for NGOs to be more effective in the international realm by enabling them to recruit and communicate with members internationally.

Held¹⁵⁰ and Clark¹⁵¹ declare that "for the most part, it is only in the post-Cold War era that the historically estranged literatures of international relations theory and democratic theory have begun to exhibit a shared fascination with the idea of democracy beyond borders, that is

¹⁴⁶ N 183, James Crawford, 'Democracy and the Body of International Law' in Fox & Roth (2000), pp.91-120, Rich (n111)pp.20-34, Thomas M. Franck, *Fairness in International Law and Institutions* (OUP, 1998), James Crawford, *Democracy in International Law: Inaugural Lecture* (CUP, 1994), Susan Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (OUP, 2000) and L. Ali Khan, *A Theory of Universal Democracy: Beyond the End of History* (Kluwer Law International, 2003).

¹⁴⁷ Wouters & others (2003), p.19.

¹⁴⁸ *ibid*

¹⁴⁹ Baslar (2006), p.76

¹⁵⁰ Held (1995)

¹⁵¹ Ian Clark, *Globalization and International Relations Theory* (OUP, 1999)

transnational (or global) democracy”.¹⁵² These two authors could be right in highlighting the significant impact of the end of the Cold War. However, claiming that international relations theory has become out of date would be an exaggeration. Of course, a “transnational turn” in the post-Westphalia era could be discerned, and thus a significant shift in the concept of democracy as it has crossed national boundaries.¹⁵³ However, this process is still evolving; and international relations theory must thus be updated to some extent, while still acknowledging vestiges of the dominance of nation-states.

Delbruck aptly declares that “the allocation of public authority to entities beyond the state” has been put firmly on the agenda for discussion, and that the legitimacy of public authority has thus begun to be questioned.¹⁵⁴ This is in fact an essential point in the new international legal order. Prof Baslar has divided the last few centuries into the three eras of the *aristocratic*, *oligarchic* and *democratic*. By his account the *aristocratic* period, in which states were the predominant actors, occurred during the 17th and 18th centuries. The *oligarchic* period lasted until middle of the 20th century and involved not more than 50 states, while international organizations were considered as legal persons in international law. During this period the legislative process was under the control of intergovernmental actors.¹⁵⁵

¹⁵² McGrew (2002)

¹⁵³ *ibid*

¹⁵⁴ Delbruck divides the allocation of public authority into three categories: 1. to international governmental organizations; 2. to supranational organizations; and 3. to nongovernmental organizations”. Delbruck (2004), pp.36-47

¹⁵⁵ Baslar (2006) p.249

While it was not possible to question the legitimacy of the process by which law was adjudicated because of the predominance of a strongly positivist approach in the *aristocratic* period, a limited and non-functional opinion on legitimacy was dominant in the *oligarchic* period. However, a *democratic* period has emerged in the last 20 (now 30) years in which non-state, sub-state and supra-state actors have increasingly been participating in the formulation of international law, making democratic legitimacy of increasing importance.¹⁵⁶ It can be concluded that the participation of non-state entities has both instigated and accelerated the democratic process in the international legal order. NGOs as significant non-state actors have made remarkable contribution to this process.

Representative democracy has consequently been supplanted by participatory democracy, since NGOs have been considered as more representative of people's interests.¹⁵⁷ This is indeed an inevitable outcome when globalization coincides with the lack of accurate representation in the international sphere. The UN has also explicitly accepted with favour the fact that 'citizens everywhere have found new channels of political expression and activity through NGOs and transnational movements'.¹⁵⁸ Representative democracy is not adequate and it has been abused;¹⁵⁹ people are therefore seeking alternative means of representation in the international legal order's agenda. Globalization has tolerated innovations and the activities of NGOs.¹⁶⁰ Worldwide, people have begun to coalesce under

¹⁵⁶ *ibid*

¹⁵⁷ Archon Fung & Erik Olin Wright, 'Deepening Democracy: Innovations in Empowered Participatory Governance' (2001) 29 *Politics & Society*, pp.5-41, p.5.

¹⁵⁸ Jean-Philippe Therien & Madeleine Belanger-Dumontier, 'The United Nations and Global Democracy: From Discourse to Deeds' (2009) 44 *Cooperation and Conflict: Journal of the Nordic International Studies Association*, pp. 355–377, p.359.

¹⁵⁹ *ibid*

¹⁶⁰ *ibid*

the umbrellas of NGOs, and in so doing have increased their participation in the international organizational decision-making process. NGOs have thereby striven to insinuate themselves directly or indirectly into that process.¹⁶¹

¹⁶¹ *ibid*

2.3 Why CD: Abandoning the State-Based System

CD is not only one example of an approach to both cosmopolitanism and democracy. CD was first suggested by Daniele Archibugi and David Held at the end of the Cold War, as a new wave of democratization was building.¹⁶² A group of thinkers have developed the project for the purpose of providing intellectual arguments in favour of an expansion of democracy, both within states and at the global level, in the early 1990s.¹⁶³ CD has endeavoured to provide a response to issues such as the conditions under which public opinion could become paramount, the extent to which the general public could control the actions undertaken by the various subjects, be they national governments, international organizations or multinational corporations, and the institutional instruments that are available to confer an effective political role on the planet's inhabitants.¹⁶⁴ A significant and growing body of literature on supporting the democratizing globalization¹⁶⁵ has developed, whose authors include Falk, McGrew, Koehler, Habermas, Kaldor, Linklater, Dryzek, Thompson, Holden, Franceschet,¹⁶⁶ Boutros-Ghali and Morrison.¹⁶⁷ Naturally, these scholars disagree on some matters, but their main point in common is the development of democracy beyond state borders. They offer a

¹⁶² David Held, 'Principles of the Cosmopolitan Order' in G Brock & H Brighouse, (eds.) *The Political Philosophy of Cosmopolitanism* (CUP, 2005); Archibugi and Held (2011), p.433. Archibugi (2008), Daniele Archibugi & David Held (eds.), *Cosmopolitan Democracy: An Agenda for a New World Order* (Polity Press, 1995) and Held (1995)

¹⁶³ *ibid*

¹⁶⁴ Archibugi (2008), pp.2-3

¹⁶⁵ Daniele Archibugi, 'Cosmopolitan Democracy and its Critics: A Review' (2004) 10 *European Journal of International Relations*, pp.437-473, p.438. Some authors criticize CD, finding it inadequate. However, they agree with some of its basic tenets such as applying rules of law and shared participation in the fields of the international legal order. In common with CD, they urge the democratization of globalization

¹⁶⁶ Antonio Franceschet, *Kant and Liberal Internationalism: Sovereignty, Justice and Global Reform* (Palgrave, 2003)

¹⁶⁷ Bruce Morrison (ed.), *Transnational Democracy: A Critical Consideration of Sites and Sources* (Ashgate, 2003)

variety of approaches to achieving this goal. Therefore, even though some of them do find fault with CD, the points on which they agree with it allow their use as supporting arguments in the present work.

Falk argues that a proper response to the emerging problems of the modern world demand a fundamental revision of the concepts of sovereignty, democracy and security in practice. These concepts are subject to reshaping in the context of a transformation from a state-centric world to global governance.¹⁶⁸ He is clear that a fundamental change accompanied this transformation from state-centrism to globalism, and he thus considers the revision of basic tenets as a crucial necessity.

McGrew also underlines the transformation of Westphalian state-based system, stating that “a post-Westphalian world order in the making as sovereign statehood is transformed by the dynamics of globalization”.¹⁶⁹ He thus requires a conceptual shift, arguing that the perspective of thought should change from geopolitics to global politics. He also indicates that it is necessary to take non-state actors into account.¹⁷⁰ He thus demands consideration of the changing from inter-state relations to global politics, where states and non-state actors act together within a shared global social space.¹⁷¹

¹⁶⁸ Richard Falk, *On Humane Governance: Towards a New Global Politics* (Pennsylvania State University Press, 1995) and Falk (1998)

¹⁶⁹ Anthony McGrew (ed.), *The Transformation of Democracy?: Democratic Politics in the New World Order* (Open University Press, 1997); McGrew (2002) and Anthony McGrew, ‘Globalization and Global Politics’ in John Baylis, Steve Smith & Patricia Owens (eds.), *The Globalization of World Politics: An Introduction to International Relations* (5th ed., OUP, 2011), p.32

¹⁷⁰ *ibid*

¹⁷¹ *ibid*

Holden likewise states that “the international pre-eminence of intrastate democracy is now beginning to flow over into the international order”.¹⁷² He first considers the triumph of democratic nations as the fulcrum for the development of global society,¹⁷³ which is why there has been an increasing interest in the idea of global democracy.¹⁷⁴ He maintains that the growing significance of democracy within states has contributed to recognition of the practical importance of democracy between them, having generated an increasing demand for democratization internationally. In addition, the “growth of globalization, interdependence and environmental pressures” has also contributed to the demand for international democratisation.¹⁷⁵

Habermas indicates that nation-states have been undermined by the processes of globalization, noting that they are therefore no longer able to claim the right of unlimited sovereignty and control over the traditional structures of international law. He also considers that the principle of non-interference in a nation-state’s internal affairs has been contravened many times during the twenty-first century. He believes that the international community must establish supranational institutions in which individuals could also participate.¹⁷⁶

Kaldor emphasises the impact of globalization on the character of war, believing that the need for a cosmopolitan political response replaces individual rights and the rule of law as

¹⁷² Holden (2000), p.1

¹⁷³ Holden states that “...Although this triumph may not be accepted as a fact, that the idea of democratic government has never been so popular cannot be denied.”

¹⁷⁴ *ibid*

¹⁷⁵ *ibid*

¹⁷⁶ Jurgen Habermas, *The Inclusion of the Other: Studies in Political Theory*, edited by C. Cronin and Pablo de Grieff (Polity Press, 1998) and Jurgen Habermas, *The Postnational Constellation* (Polity Press, 2001).

cornerstones of any international action.¹⁷⁷ She also considers changes in the international legal order and demands a suitable response to the consequent new facts this new order has created. She underlines the importance of individual rights as a fundamental issue and offers a cosmopolitan political response as a suitable approach to the points raised. Linklater likewise affirms that globalization has challenged the traditional practices of nation-states, making it possible to establish new forms of political community such as the cosmopolitan that is sensitive to differences and aims to reduce inequalities.¹⁷⁸

Dryzek also holds that international civil society has played a significant role in the democratization of international institutions.¹⁷⁹ Thompson similarly emphasises the importance of individual participation. Although some perceived inadequacies of CD concern him, he agrees that if an international system allowing individual participation were to be adopted, it would present the opportunity to hold political decision makers to account, allowing the challenges of global society to be dealt with more efficiently.¹⁸⁰

These ideas are linked to several arguments for cosmopolitanism: globalisation and its effects on the post-Westphalian world order, challenges to the control and sovereignty of traditional nation-states, and the expanding role of civil society and NGOs. In fact, these arguments are related to the present thesis, which also underlines the changed conditions in the international legal order. It criticizes the state-centric system as being an inappropriate means for the

¹⁷⁷ Mary Kaldor, *New and Old Wars* (Polity Press, 1999).

¹⁷⁸ Andrew Linklater, *The Transformation of Political Community* (Polity Press, 1998).

¹⁷⁹ John S. Dryzek, 'Transnational Democracy' (1999) 7 *Journal of Political Philosophy*, pp.30–51.

¹⁸⁰ Dennis F. Thompson, 'Democratic Theory and Global Society', (1999) 7 *Journal of Political Philosophy* 7, pp.111-125.

UNSC to deal with the challenges of the current world order, arguing instead that the way of overcoming those challenges is to provide formal access for NGOs that have significantly increased their role in the international legal order. It thus concludes that the Council cannot remain aloof from this emergent reality.

Despite previous attempts to enhance the transparency and accountability of, as well as participation in, world politics, and to increase respect for the rule of law, from Immanuel Kant to Richard Falk,¹⁸¹ the idea of applying democracy conceptually and practically beyond nation-states has hitherto been considered to be an innovative development.¹⁸² In this context, most international relations textbooks prior to 1989 do not even contain the word ‘democracy’, and even those that do might still not refer to world politics.¹⁸³ According to Archibugi and Held, most of these textbooks did not evaluate the concept of democracy beyond national borders, but rather addressed purely domestic issues. These authors believe that this was because the Cold War hindered the democratization of the international system.¹⁸⁴

Nevertheless, after the fall of the Berlin Wall, scholars and policymakers have begun to reconsider democracy in the face of global changes and, as a result, to discuss the application of democracy beyond borders.¹⁸⁵ As mentioned earlier, McGrew contends that a

¹⁸¹ Archibugi and Held (2011), p.433.

¹⁸² *ibid*

¹⁸³ *ibid*

¹⁸⁴ *Ibid*, p.434

¹⁸⁵ More accurately, the rise of Arab spring in theory but the Arab winter in practice was triggered by civilians demanding more democratic rights. What is more, it is quite plausible to suggest that most countries are more democratic than they were before 1990. Even autocratic regimes have begun to be concerned about how long

transformation has occurred from inter-state relations to global politics in the post-Westphalian world order.¹⁸⁶ Holden also points out that the collapse of communism has contributed to the development of international democracy.¹⁸⁷ In this regard, most recent international relations textbooks devote at least one chapter to the question of democracy by evaluating the impact of globalization.¹⁸⁸

Archibugi and Held find that not all commentators are convinced that CD is necessary or desirable. They define the concept as an attempt to avoid a single hierarchical form of authority and to generate democratic governance at a variety of levels including the global, providing for individuals to participate in world politics by involving them in decisions that affect them.¹⁸⁹ Their fundamental point is that CD is a way of gradually improving democracy all levels of the world. In this regard, CD deems it possible to reform international organizations.¹⁹⁰ They offer as an illustration the supposition that, if global politics were to become more representative and accountable, it would lead to the consolidation of domestic

their power can endure, as their legitimacy is increasingly called into questioned. For instance, the Saudi government has had to consider measures to placate popular opinion, the Princely family has begun to come in for criticism. Eventually, as unrest was spreading across the Middle East, the Saudi government poured billions of dollars to help Saudis buy houses and start businesses in an obvious attempt to stave off protests. See more: NBC News: Saudi King Offers Billions in Gifts to Citizens (23/02/2011)

<http://www.nbcnews.com/id/41733661/ns/world_news-mideast_n_africa/t/saudi-king-offers-billions-gifts-citizens/#.VZkzuVlVikp> accessed on 07/05/2015. There are still such attempts by the Saudi government: see more at Tom Decent, 'Saudi Arabia's King Salman Gives Citizens an Extra Two Months' Salary' (30 January 2015) <<http://www.smh.com.au/world/saudi-arabias-king-salman-gives-citizens-an-extra-two-months-salary-20150130-1328x7.html>>

¹⁸⁶ McGrew (2011), p.32

¹⁸⁷ Holden (ed.), *Global Democracy*, p.1

¹⁸⁸ *ibid*

¹⁸⁹ Likewise, McGrew emphasises an international system in which states and non-state actors work together. McGrew (2011). Kaldor also points out the necessity of a cosmopolitan political response: Kaldor (1999).

¹⁹⁰ Archibugi (2008), p.3

politics. So CD has more goals than just its main one of democratizing global governance: it also addresses local, national and regional levels, aiming to sow the seeds of nonviolence, political equality and popular control at each of these levels.¹⁹¹

Archibugi holds that “cosmopolitan democracy is an ambitious project whose aim is to achieve a world order based on the rule of law and democracy”.¹⁹² At the same time, he indicates that “democracy is to be conceptualized as a process, rather than as a set of norms and procedures”.¹⁹³ CD is sceptical about the positive outcomes of military interventions, which have ostensibly been motivated by humanitarian intentions, yet are not an effective way of achieving peace and security.¹⁹⁴ CD rather prefers the active diplomacy of people and arms control. This point is an essential aspect of the current thesis, which criticises the UNSC’s military operations as interventions that could cause more crises in international affairs as well as in the regions subject to such intervention. In this regard it is suggested that participation of NGOs would increase the Council’s diplomatic power, making it possible for it to cope with international conflicts peacefully.

¹⁹¹ *ibid*

¹⁹² Daniele Archibugi, ‘Principles of cosmopolitan Democracy’ in Daniele Archibugi & David Held (eds.) *Re-Imagining Political Community: Studies in Cosmopolitan Democracy* (Stanford University press, 1998), p.198.

¹⁹³ Archibugi (2004), p.439

¹⁹⁴ Archibugi (2008), p.111-112

2.3.1 Contributions of CD to Study

The UNSC is a product of a time in which the state-based system was paradigmatic. Its structure was thus shaped in accordance with the circumstances of the 1940s. The post-Westphalian era has strongly challenged the assumptions underlying the Westphalian period. The international legal order has shifted significantly away from a state-based system, incorporating many new actors such as NGOs.¹⁹⁵ Many new problems have also arisen with which states have found it difficult to deal without the cooperation of these new actors.¹⁹⁶ The UN's principal organs such as ECOSOC, the General Assembly, the Secretariat, the International Court of Justice and even the UNSC have consequently established relations with these new actors.¹⁹⁷ On the other hand, organisations that have insisted on adhering to the state-based system have failed to achieve their objectives. The UNSC is one of these conservative organisations, as its interaction with those new actors has proved unsatisfactory having been only on an ad hoc or irregular basis such as informal meetings. It has been the target of constant criticism because of its failure to maintain international peace and security. In this regard, numerous reform proposals have been submitted with the purpose of enhancing the Council's role. Yet these proposals have not received the full approbation of states, which have found them both unsatisfactory and infeasible.¹⁹⁸

¹⁹⁵ McGrew (2011) p.32

¹⁹⁶ David Held, 'Principles of Cosmopolitan Order' in Garrett W. Brown and David Held (eds.) *The Cosmopolitanism Reader* (Polity Press, 2010) p.229

¹⁹⁷ 'NGOs and the General Assembly' <https://www.globalpolicy.org/un-reform/31811-ngos-and-the-general-assembly.html>; Article 71 of the UN Charter; Saratoon Santivasa, 'The NGOs' Participation in the Proceedings of the International Court of Justice' (2012) 5 *Journal of East Asia & International Law*, p.377; 'Advocacy and Support within the Secretariat' <https://www.globalpolicy.org/component/content/article/176/31440.html> and 'NGO Working Group on the Security Council' <http://www.ngowgsc.org/>

¹⁹⁸ Only one reform took place since the establishment of the UNSC in 1965 as the number of non-permanent members was expanded from six to ten.

This thesis thus aims to find a way to revitalize the UNSC in order to bring it into the new era. It hopes not to share the same fate as previous reform proposals.¹⁹⁹ To this end, the real problem of the UNSC is defined and the proposed remedies are intended to be as feasible as possible. The thesis suggests that the Council's focus should shift from a state-based system to become an entity capable of solving current international problems and being compatible with the current international legal order. Thus, in contrast to previous state-based recommendations,²⁰⁰ it advocates reform based on the current world order. This proposal avoids amendments to the UN Charter as being infeasible. It thus aims to present a progressive proposal that will pave the way for an ideal UNSC, rather than attempting to implement such a solution immediately. Formal participation by NGOs being obviously important, CD is found to be the theory that best answers the aim of this thesis.

The proposed theory should meet the thesis' aims. Firstly, the theory should aim to reform international organizations. Secondly, it should deal with the principles of democracy such as accountability, representativeness and effectiveness. Thirdly, it should consider the use of military force only as a last option; it should thus aim to decrease the use of military force. Fourthly, it should take account of new actors in the international legal order, and should therefore reject a solely state-based structure. Finally, in order to fulfil these aims, it must adopt a progressive approach: the implementation of its proposed actions must be long-term if it is to achieve its purposes. By contrast, the transnational democracy theory of radical democratic pluralism rejects the reformist approach and aims at direct democracy. This

¹⁹⁹ Winkelmann (1997), pp.35-90; Cox (2009) pp.89-128; and Kelly (2011), pp.319-407; Center for UN Reform Education, 'Security Council Reform' <http://www.centerforunreform.org/?q=securitycouncil>

²⁰⁰ Previous reform proposals mostly aim to enlarge the size of the UNSC by adding more non-permanent or permanent member states. Some also suggest the removal or restricting of the veto power. Center for UN Reform Education, 'Security Council Reform' <http://www.centerforunreform.org/?q=securitycouncil>

radical theory believes that existing structures of global governance are inimical to the interests of humanity. The present work thus advocates a gradual or incremental change involving small steps rather than a rash leap to an ideal solution.

CD is the most suitable answer for these purposes.²⁰¹ It might be considered as a deficiency in this work that it does not refer directly to CD throughout. Yet this procedure is reasonable when it is considered that CD's main pioneers are mostly referred to. On the other hand, it would be wise to explain why CD is favoured over other democracy theories. The question of CD's relevance to reform of the UNSC must also be addressed.

It is necessary for the UNSC to consider the developments of post-Westphalian order. A significant number of problems are seen to be emerging with which the state-based system alone cannot cope because it is hypocritical,²⁰² and lacks both altruism²⁰³ and necessary sources.²⁰⁴ At this juncture, CD makes a significant contribution by its criticism of the state-centric structure. In particular, Daniele Archibugi's argument regarding the hypocrisy of states allows a clearer criticism of the UNSC's structure, and consequently the development of a stronger line of reasoning as to how that state-centric system should be changed.

Any suggestions of a more representative or democratic UNSC cannot ignore the participation of NGOs. States are no longer the sole actors in the international legal order in the post-Westphalian world. CD increases the opportunity to argue for the participation of NGOs in the UNSC. For example, it considers the participation of new actors in the decision-

²⁰¹ See the table of CD criteria in Archibugi (2008), pp.103-106

²⁰² The hypocrisy feature of States is argued in the Chapter III.

²⁰³ It is argued in the Chapter VIII.

²⁰⁴ The significant roles of NGOs are mentioned in the Chapter IV.

making process as an essential factor in raising the level of democratization, allowing that argument to be applied specifically to the UNSC.²⁰⁵ It also provides a way to highlight the indispensability of granting NGOs formal access to the Council.

The democratic concept must also be approached more in terms of internationality, as the UNSC is an international entity. CD presents the opportunity of finding a way of making an international entity more democratic. For example, one of its tenets not only directly contradicts the traditional position that international organizations cannot be democratized, but shows how this is possible. It thus provides insights into how to develop arguments about democratizing the UNSC.

To sum up, this thesis thus presents a reform proposal that would solve the UNSC's general problems such as representativeness, accountability, transparency, minimizing the application of military force, and efficiency. NGOs are considered as potential actors in the achievement of these goals. As observed above, CD is one means of justifying this proposal. The reason for choosing CD is that it sets out to be more inclusive: it takes democracy further and aims to increase nonviolence, political equality and popular control and to expand democracy beyond its traditionally state-centered domain. The decision-making process must involve individuals affected by those decisions. History is witness to the failure of democratic states to establish a democratic international system. It is therefore pertinent to challenge this state of affairs by establishing a democratic international structure and then also consolidating democracy within state's borders.

²⁰⁵ A more democratic SC refers to more representative, more accountable, more effective. This point is evaluated in the Chapter III.

2.3.2 Other Alternative Theories

CD is only one example of an approach to transnational democracy. There are other alternative ways of making international institutions more democratic. As explained in the methodology section, there is no single correct or perfect method. In that respect, a work could incorporate more than one methodology in accordance with the character and requirements of the research.²⁰⁶ CD might be the most suitable for the purposes of this study, but reference is also made to other theories as necessary to support the present argument. Three other distinctly transnational democratic theories also contain some of these principles: deliberative democracy, liberal-internationalism and radical pluralism. These three also aim to take democracy beyond nation-states, but their solutions implicitly contradict some elements of CD,²⁰⁷ and all of these theories are therefore compared in order to justify the author's preference for CD.

Deliberative democracy holds that legitimacy is engendered by the participation of several actors and that the decision-making process has a democratic, transparent and accountable character in which participants can question each other's interests and justify the public weal.²⁰⁸ It also considers the participation of other actors alongside states and it implies accountability.

²⁰⁶ Morris & Murphy (2011) p.29

²⁰⁷ "Both cosmopolitan and civil societarian theories, while directing our attention toward some promising opportunities in the international arena and in communal associations, neglect the need to adjust our conception of politics in its more familiar site, the state." Thompson (n181), p.123

²⁰⁸ Nanz & Steffek (2004), pp. 314-335

Liberal-internationalism responds to the question of transnational democracy by developing more representative, accountable and transparent international organisations.²⁰⁹ The distinguishing idea of liberal-internationalism is “civil society”: it implies that states have been embedded in “domestic and international civil society”, which systemically hinders state actions.²¹⁰ In this theory, civil society is considered as a political space where individuals and voluntary associations seek to shape the rules that “govern one or other aspect of social life”.²¹¹ What is more, citizens could non-coercively be brought together by civil social groups in order to form “the formal laws and informal norms that regulate social interaction”.²¹²

Radical democratic pluralism involves a substantive perspective on democracy.²¹³ It is concerned with establishing “good communities” based on “normative principles of equality, active citizenship, the promotion of the public good, humane governance and harmony with the natural environment”.²¹⁴ This philosophy seeks to adapt notions of direct democracy and self-governance to suit an era in which structures of transnational and global power regulate the circumstances of “daily existence of communities and households across the world”.²¹⁵

²⁰⁹ Richard Falk, ‘Liberalism at the Global Level: The Last of the Independent Commissions?’ (1995) 24 *Journal of International Studies*, pp.563-576

²¹⁰ Moravcsik (1992), p.1.

²¹¹ Scholte (2004), pp.213-214.

²¹² *ibid*

²¹³ McGrew (2002)

²¹⁴ *Ibid*, p.5

²¹⁵ John Burnheim, ‘Power-Trading and the Environment’ in Freya Mathews (ed.), *Ecology and Democracy* (Frank Cass, 1996), pp.49-65; and Rob B. J. Walker, ‘International Relations and the Concept of the Political’ in Ken Booth & Steve Smith (eds.) *International Relations Theory Today* (Polity Press, 1995), pp.306-327

The abovementioned alternative theories are also of significant value for developing a more democratic SC. Nevertheless, none of these three theories comprehend the purposes of this study. For example, none of them strongly recommends decreasing the use of military force.²¹⁶ Nor, despite their eagerness to highlight the importance of the participation of non-state actors, is any of them keen to criticize the state-based system.²¹⁷ None of them adopts an even vaguely progressive approach.²¹⁸ They do have some points, such as the participation of NGOs and increasing accountability in common. Yet it is CD that comprehensively answers the purposes of this thesis, and it is therefore more practicable to employ it than to aggregate the common points of different theories.

²¹⁶ This study points out that the outcomes of military interventions are more often negative than positive. Therefore, in order to establish durable peace settlements, it is argued that the Council should consider other means such as diplomacy and economic and political sanctions. This issue is discussed in Chapter VIII

²¹⁷ Even though liberal international theory highlights the significance of transnational civil society, it stresses the accountability of international organizations to national governments. Thus, it still remains state-centric. Anthony McGrew, Models of Transnational Democracy in David Held & Anthony McGrew (eds.) *The Global Transformations Reader: An Introduction to the Globalization Debate* (Polity Press, 2003), p.501

²¹⁸ The radical democratic pluralist theory refuses strongly reforming existing structures of global governance. McGrew (2002)

2.4 Critical Analysis of CD

As stated above, CD is only one example of an approach to both cosmopolitanism and democracy. It might be the best theory for the purposes of the current study, yet it might not be the perfect one to make the world order more democratic. There are some objections to CD. Martell maintains that cosmopolitan goals cannot be achieved by cosmopolitan democracy.²¹⁹ He has its doubts about cosmopolitan democracy while agreeing that it has value. For him, "...cosmopolitans are well-intended and concerned about the world's problems and cultural harmony and are proposing routes for solving them".²²⁰ He concedes the existence of common global problems, but questions whether global politics is the best way of tackling them. He believes that the world as it is is not ready for a cosmopolitan order because of the lack of sociological and empirical basis in society. A defence of CD would, therefore, obstruct the development of alternative analytical means of arriving at cosmopolitan ends. He suggests that such ends would more likely be achieved through the adoption of non-cosmopolitan means. This is in fact the strongest argument against CD, as the current international legal order may not be ready for such measures. That does not mean it will not be ready in the future. The current study acknowledges difficulty that the time may not yet be right for its proposal.

Martell asserts that CD requires individuals and states to abdicate their own interests. He is concerned that this is not happening. He does accept that some cosmopolitan developments could be seen as a basis for cosmopolitan politics, but he does not see these as being widely

²¹⁹ Luke Martell, 'Cosmopolitanism and Global Politics' (2011) 82 *The Political Quarterly*, 618

²²⁰ *ibid*

accepted. A global consciousness regarding ecological problems that would produce cosmopolitan sensibilities might, for example, be dawning, but he believes that “this is speculative there is no good evidence for it”.²²¹ It might be easy, he says, for some groups to come together to combat factors that cause environmental pollution, as such action would be for their own benefit. Nevertheless, that same action could be inimical to the interests of some other groups such as factory owners or oil companies. Therefore, he concludes that circumstances are far from being cosmopolitan.

In addition, realists also see the academic advocates of CD as dreamers.²²² They believe that the world is very different than imagined by this theory, maintaining that international relations should be regulated according to principles of force and interest. They therefore think that any effort to tame the international legal order by institutions and public participation cannot be considered as anything more than purely utopian.²²³ On this view, some realists reject the feasibility and the desirability of the CD project.

David Held points out, however, that CD acknowledges the importance of force and interest, without regarding them as the sole principles by which to shape the international legal order.²²⁴ The realist view that the mechanisms by which the world operates are different than

²²¹ *ibid*, p.620

²²² Klaus Dieter Wolf, ‘The New Raison d’Etat as a Problem for Democracy in World Society’ (1999) 5 *European Journal of International Relations* 333-363. In addition, Archibugi names some of those who consider CD to be nothing more than utopian: Danilo Zolo, *Cosmopolis: Prospects for World Government* (Polity Press, 1997), Geoffrey Hawthorn, ‘Running the World through Windows’ (2000) 5 *New Left Review* 101-110 and David Chandler, ‘New Rights for Old? Cosmopolitan Citizenship and the Critique of State Sovereignty’ (2003) 51 *Political Studies* 332-349

²²³ Chandler, *ibid*; Hawthorn (2000); Zolo (1997)

²²⁴ Held n196(2010), p.229

those advocated by CD ignore the mutability of international circumstances.²²⁵ Their assumption would have been prevailed before the 1990s, but the events of the last two decades offer very little to substantiate this viewpoint.²²⁶ Furthermore, Archibugi also affirms that, if the realists were right, democracy itself should not have existed as a political system.²²⁷ Yet it does so, even despite its imperfections. CD also refutes the realist argument that its adherents simply restate their beliefs dogmatically.²²⁸

In short, this objection could be referred to as the difficulty of CD's practicality. The realist view rejects the philosophy's feasibility, basing its argument on the fact that the international legal order is based on power and interests. They thus believe that there is conflict of interests that would not allow CD to be implemented. In this respect Martell accepts the realist view. He goes further, however, to make alternative suggestions by which cosmopolitan goals can be achieved. His criticisms are thus more constructive than the simple realist dismissal of CD as a dream. At least he does not merely disparage CD as an unrealistic or infeasible vision.

Nevertheless, CD does in fact take the realities of the international legal order into account, thus actually recognising facts ignored by realists. This does not mean the total rejection of force and interest as factors to be taken into account, but only of their monopoly as considerations. Barack Obama has recently stated that the traditional use of force is no longer

²²⁵ *ibid*

²²⁶ *ibid*

²²⁷ Archibugi (2004), 453

²²⁸ *ibid*

an efficient way of dealing with problems in the international legal order.²²⁹ Many international treaties have been adopted by states who have relinquished their interests. If the realist perspective were valid, many international humanitarian treaties and mechanisms for cooperation would not have been considered by international actors.

Martell's assumptions might be correct as regards climate problems. Yet global terrorism is a very common threat to regions throughout the world. Action in common is thus required to deal with it. The issue of international security and peace is not one that can be postponed to appease economic interests. Besides, the global world order has made international peace and security an ever more pressing concern for the world community. It was formerly possible to confine the negative outcomes of a conflict to a single region, but no longer. None can claim that the impact of the Syrian crisis is limited to the Middle East. There could be a variety of interests regarding that conflict, but the significance of the threat could bring different interest groups together because if they were not to take action in common, it would disadvantage all of them. In fact, this is the reason supranational organizations are needed to discuss problems that arise from clash of interests. For example, the threat posed by the terrorist group ISIS has resulted in action common to the permanent five UNSC members. The problems of climate change may thus be very hard ones and take much longer to resolve, but an issue of security and peace is hard to ignore once it has become international.

What is more, Eckersley points out that the majority of like-minded cosmopolitan nation states must agree in order to achieve a cosmopolitan global order. He thus believes that CD

²²⁹ President Obama Speaks with VICE News, <<https://news.vice.com/video/president-obama-speaks-with-vice-news>> accessed on 23/03/2015

should not attempt to weaken nationalism, but rather should seek ways that would rescue, reframe and harness nationalism in order to take on a more cosmopolitan character.²³⁰ Martell also sees a difficulty of reaching cosmopolitan ends by cosmopolitan means in the obstacle to CD presented by the material interests of states. While agreeing that it could occur in the public arena, he does not see cosmopolitan culture as prevailing over the behaviours of politicians. Because politicians as decision-makers are more motivated by the material interests of their own states, they are less influenced by the values of people.

Organisations such as the UN, global economic organizations like the World Bank and the IMF, international human rights regimes, international NGOs and global social movements could be basis for cosmopolitan institutions. Martell affirms that even though states have engaged in global negotiations over trade, debt, aid, climate change and nuclear proliferation, those attempts have often failed due to the fact that national interests have overridden cosmopolitanism.²³¹ It is hard to develop cosmopolitan democracy if political institutions' interests clash. In order to develop CD, there must be common material interests in addition to public awareness, but such common material interests in global issues is hard to find.²³² Likewise, Brown also indicates that globalization may make it possible to develop universal closer relations, but that this does not lead to common beliefs and interests.²³³ In short, even if the public is culturally motivated by cosmopolitan values, it would hardly impact on decision makers, because those values would be undermined by material interests.

²³⁰ Robyn Eckersley, 'From Cosmopolitan Nationalism to Cosmopolitan Democracy' (2007) 33 *Review of International Studies* 675-692, 676

²³¹ *ibid*, p.622

²³² *ibid*

²³³ Robin Brown, 'Globalization and the End of the National Project' in John MacMillan and Andrew Linklater (eds), *Boundaries in Question: New Directions in International Relations* (Printer, 1995) 54

There is indeed a difficulty in overcoming politicians' material interests, but there are some counter-examples that might illustrate that public concerns could prevail over the concerns of decision makers. For example, the Syrian refugee crisis has been a significant issue since the conflict there began in early 2011. When a picture of the dead body of a small child was broadcast through the media and on the Internet, it caused many people to take action such as petitioning parliaments around the world. Ultimately, many governments had to take the refugee issue into more serious consideration and take steps to deal with it.²³⁴ That the public could influence decision-maker despite material interests therefore cannot be denied with any certainty, but the difficulty of such an outcome must likewise be recognized.

Kuyper indicates that globalization makes CD a necessary project while relegating its fulfilment to the distant future.²³⁵ He concedes that there might well be increased interdependence and cooperation of actors at the global level that renders the CD proposal necessary. On the other hand, he points out that globalization also amplifies power imbalances and skews the interests of various actors.²³⁶ He also puts forward the argument that CD has failed to provide empirical evidence that could support its vision. He thus suggests that CD should focus on questions emanating from Historical Institutionalism (HI) and International Relations (IR) rather than only grounding itself in the democratic equality of individuals while advocating the abolition or establishment of international organizations. He states that "how agreement can be reached under uncertainty, how nation-states could credibly commit to such a scheme, what types of institutional design should be sought, and

²³⁴ Nadine El-Enany "Who Remembers Aylan Kurdi Now?" (4 January 2016) *Media Diversified*

<http://mediadiversified.org/2016/01/04/who-remembers-aylan-kurdi-now/> accessed on 25/12/2015

²³⁵ Jonathan W. Kuyper, 'The Limits of Design for Cosmopolitan Democracy' (2012) 4 *Public Reason* 28-47

²³⁶ *ibid*

other questions must be analyzed in depth”.²³⁷ In fact, CD also tries to respond to these questions, noting for example the requirement for states to approve the compulsory jurisdiction of the ICJ.²³⁸ CD also considers the progressive approach that would be necessary when it proves hard for actors to reach a consensus.²³⁹ The present study likewise considers how the UNSC’s efficiency could be improved rather than directly proposing a replacement cosmopolitan structure.

Another reservation about CD is that it could be misused by powerful states for their own interests. The philosophy represents a world in which all individuals have obligations to one another and have a say as though there were no inequality and no powerful actors.²⁴⁰ At this juncture, powerful states could use cosmopolitanism as a tool for their own interests by paying lip service to it while advancing their own ends. Likewise, Patomaki and Hutchings argue that the CD project could be used to legitimate a new form of imperialism even as it presumes the universal validity of Western democratic values.²⁴¹ In fact, this criticism applies to any system, not just to CD. Any system runs the risk of being misused by the wielders of power. CD is more about providing a mechanism that could hold powers accountable. It requires states to approve the compulsory jurisdiction of the ICJ.²⁴² It is true that this may not be adequate, but no system can be guaranteed to be free of the potential for abuse by powers.

²³⁷ Ibid, p.44

²³⁸ Held n196 (2010), p.229

²³⁹ ibid

²⁴⁰ ibid

²⁴¹ McGrew (2002), p.269

²⁴² Held, ‘Principles of Cosmopolitan Order’ (2010)

Archibugi argues that even though there are real-world obstacles to the implementation of CD, it should still be defended because of its visionary nature.²⁴³ Martell finds that quite risky, however:

*this can leave you arguing for something which does not work, for which there are not adequate bases, that can then be misused by the most powerful for their own ends, justifying such misuse in the name of cosmopolitanism, while serious problems go untackled because this approach does not have an effect.*²⁴⁴

He suggests an alternative route: rather than being utopian, he advocates a focus on finding supportive material. It might be possible to find shared material interests for cosmopolitanism while clashing material interests undermine it. Material interests may make it difficult to use cosmopolitan means in order to achieve cosmopolitan ends under current conditions, yet alternative ways could be developed to pave the way for cosmopolitan goals. For example, the non-aligned movement, the G77 group of developing nations in the UN and South–South alliances between developing countries have cosmopolitan orientations but have used non-cosmopolitan means, “not via all-inclusive top-down politics but through alliances with those with whom they have connections, and in conflict with opposed interests”.²⁴⁵ Nevertheless, one of CD’s important assumptions is that it adopts a progressive approach: it does not regard the acknowledged obstacles to its implementation posed by current conflicts of interests as insuperable, but as difficulties; CD can be defended and implemented in gradual steps.

Held and Archibugi argue that it is possible to implement CD via consensus and agreement between actors.²⁴⁶ However, Martell suggests a perspective that “involves a conflict model of

²⁴³ Archibugi (2004), 454

²⁴⁴ Martell, p.624

²⁴⁵ *ibid*

²⁴⁶ Archibugi and Held (2011), pp.433-461

society more than an approach that is optimistic about difference as a basis for consensus”.²⁴⁷ Held and Archibugi believe that it is possible to construct an institution by involving all actors through CD,²⁴⁸ which is to say that they adopt an inclusive global-level approach. Yet they base their argument on denying “the possibility of having a political enemy and hence also rhetorically deny their political nature”.²⁴⁹ In fact, CD does not deny the possibility of having enemies. It suggests forming an international institution where different interest groups could come together and reach a consensus that would benefit all the actors.

Held and Archibugi have adopted a ‘top-down’ inclusive approach for achieving CD²⁵⁰ by considering all individuals as possible members of a single world institution. Some argue that there is always the possibility of non-members, and that CD cannot therefore include all individuals within a universal legal order. As there is always the chance that opposing parties are present, it is suggested that CD needs to contend with at least one other political identity. Cochran argues that “the need for further democracy cannot be simply instituted from above, but should be allowed to arise from below”.²⁵¹ Martell also maintains that such attempts will not be successful, as there would be a wide variety of interests that lead to conflict and make it difficult to achieve cosmopolitan ends.²⁵² He also suggests a “bottom up” approach that

involves alliances only with those who are likeminded lower down rather than with everyone at a global level; it is not inclusive – one only allies with those with whom

²⁴⁷ Martell p.623

²⁴⁸ Held, ‘Principles of Cosmopolitan Order’ (2010)

²⁴⁹ Faustian Europe, *Cosmopolitan Democracy and Its Failure in Providing a Political Identity* 12 Feb 2009, 1

²⁵⁰ n.10

²⁵¹ Molly Cochran, ‘A Democratic Critique of Cosmopolitan Democracy: Pragmatism from the Bottom-Up’ (2002) 8 *European Journal of International Relations* 517-548, 543

²⁵² Luke Martell, ‘The Third Wave in Globalization Theory’ (2007) 9 *International Studies Review* 173-196, 178

*one can get agreement; and it is based on conflict rather than cosmopolitan consensus.*²⁵³

Indeed, the attempt to include all actors at the global level would make the implementation of CD difficult but not impossible. CD aims to include all levels, which renders it quite hard to find a common solution among numerous opposed interests. The number of actors should be very limited in order to make it easier to reach a solution. This attempt to adopt an inclusive global level by trying to involve every individual might thus constitute a weakness of CD that consigns a solution to the distant future. Yet “difficult” does not mean “impossible”.

CD goes beyond national borders and suggests a global institution that would make it possible for actors to negotiate solutions for their problems. Martell, however, holds that it is easier to make resolutions between actors at the national rather than the global level. There are too many opportunities for clashes of interest and the use of power by the most powerful states that would lead to failure. National laws, on the other hand, have provided greater opportunities for negotiation and enforcement than global ones. Martell advocates “national laws which can be made and enforced more easily, and bilateral agreements where there are less parties involved, so more chance of being achieved”.²⁵⁴ In short, Martell concludes that we should apply local and national agreements in order to achieve cosmopolitan goals at the global level. Otherwise, it is difficult obtain results via global-level agreements, as there would be many conflicts of interest. Put simply, it is easier to reach an agreement between two states than 195. It is therefore more logical to pursue means that have the chance to be

²⁵³ *ibid*

²⁵⁴ *ibid*

implemented rather than ones whose feasibility is very problematic. In short, he suggests “cosmopolitan justice without cosmopolitan politics; cosmopolitan ends without cosmopolitan means”.²⁵⁵

Such measures may be important, but they would not provide international solution for global problems such international peace and security. Two actors might be happy with a mutually agreed resolution that the rest of the world may totally disagree with. For example, some states believe that the Assad regime in Syria must remain and that all anti-government movements should cease their opposition, while other states maintain that a solution to the Syrian conflict would be possible only when the Assad regime goes. This was an intractable divergence until the ISIS threat become a significant global problem. Now these diverse actors have managed to make an agreement to fight ISIS. A mechanism that could persuade different actors to seek a common solution is therefore needed. Bilateral agreements would hardly have a global impact unless all actors agree with them.

In addition, Some argue that the main problem with CD is its inclusiveness. CD’s failure to acknowledge that “the practice of politics is necessarily contradictory to political all-inclusiveness”²⁵⁶ is regarded as a flaw that renders it unable to provide citizens with a political identity through its “aspiration towards the universal political membership”.²⁵⁷ Carl Schmitt also finds the establishment of a cosmopolitan world institution impossible:

²⁵⁵ *ibid* p.626

²⁵⁶ N.13

²⁵⁷ *ibid*

*[T]he political entity presupposes the real existence of an enemy and therefore coexistence with another political entity. As long as a state exists there will thus always be in the world more than just one state. A world state which embraces the entire globe and all of humanity cannot exist.*²⁵⁸

There would indeed be significant problems, even though cosmopolitans could legitimately found a universal legal order. First, as mentioned above, they are not able to involve everyone in it.²⁵⁹ Secondly, on Thompson's view it is very doubtful that such a universal entity could be held to account: "[The] general problem with cosmopolitan democracy is its multiplication of decision-making authorities, which is likely to result in a decline of accountability".²⁶⁰ It might be difficult to build a global identity, but it is not impossible. Besides, the difficulties inherent in accountability are arguable, and a satisfactory solution could be arrived at. In any case, such an end can surely not be foregone for such reasons, as if extant systems were perfectly accountable.

CD has been criticized by Marxists²⁶¹ for ignoring what they take to be the fundamental basis of power – namely, economics – focusing instead on the institutional aspects of the international legal order to develop a superstructure.²⁶² Marxists believe that "international

²⁵⁸ Carl Schmitt, *The Concept of the Political* p. 53.

²⁵⁹ n.13, p.5

²⁶⁰ Thomson n180 (1997), p.115

²⁶¹ Archibugi has constructed a two-fold categorisation of Marxist criticism, referring to the first group as 'The Marxist Critique I (Karl)' and the second as 'The Marxist Critique II (Groucho)'.

²⁶² Archibugi (2004) p.455

democracy as an exclusively institutional project would therefore be impossible, while only a new economic regime could lead to the transformation of world political relations”.²⁶³

Links between economics and politics have, however, become blurred as dominant transnational corporations operate in many countries and their relations with governments are quite complex. It is thus not an easy task to clearly define relations of cause and effect between politics and economics.²⁶⁴ In addition, many economic organisations have been quite satisfied with the present mechanisms of control and they do not see their interests being served by the development of democratic management over the flows of capital or international trade.²⁶⁵

It is right to point out that some economic interests benefit from crises. In addition, the impossibility of building a strong economic regime without democracy is at least arguable. Democracy entails an assurance of peace and security. If there is no safe environment, economic dynamics are not secure. For example, no investor would invest in a conflict region. In a politically chaotic environment, the ownership of banks and big companies does not constitute an issue that would command any attention. Investors would simply abandon such regions in favour of safer ones where their investments would be secure. In short, the absence of democracy also poses significant risks for economic regimes. It follows that the economy cannot play a dominant role.

²⁶³ Christoph Görg & Joachim Hirsch, 'Is International Democracy Possible?' (1998) 5 *Review of International Political Economy* 585–615

²⁶⁴ Held (1995)

²⁶⁵ *ibid*

Other Marxists criticize the very concept of CD,²⁶⁶ considering that the term “internationalism” would be more suitable than that of “cosmopolitanism”. Timothy Brennan considers that the use of the term “cosmopolitanism” is inaccurate in this context. Archibugi contradicts this firstly by claiming that the essential point is the concepts and not the words, then insisting that it is more meaningful to conceive of democracy as cosmopolitan rather than international. He sees internationalism as referring to a specific class, such as the internationalism of workers’ movements and their various international associations in the 19th and early 20th centuries.

On the Marxist perspective there is a permanent conflict of interests between rival social classes that are in conflict not only within but between states. Yet Archibugi maintains that interests are now quite different from what they were. He consequently proposes a global institution that would be able to provide effective channels to resolve conflicts. In this regard CD rejects the idea of limiting institutions to specific social classes, suggesting instead institutions in which all individuals would be directly represented at the global level regardless of their social status. Decision-making on global issues would thus be based on a majority rather than on a single class.²⁶⁷

Internationalism was based on the notion that

*after [the] proletariat had abolished social classes, conflicts between nations
also would disappear and no community would want to subjugate any other.*

²⁶⁶ Timothy Brennan, ‘Cosmopolitanism and Internationalism’ in Daniele Archibugi (ed.) *Debating Cosmopolitics* (Verso Books, 2003), 41; Antonio Gramsci, *Prison Notebooks* (Colombia University Press 1975) <<http://libarts.wsu.edu/ccgrs/undergraduate/syllabi/113/405slides3.pdf>> accessed on 19/09/2013

²⁶⁷ Archibugi (2004), 457

*Thus, it would no longer be necessary to envisage a form of international political organization to arbitrate and resolve disputes, simply because there would no longer be any need. Sovereignty itself would be dissolved together with its bearing structure, the bourgeois state.*²⁶⁸

Yet this concept is no longer suitable for the contemporary era. As mentioned above, CD rejects the delegation of authority to a single class because it does not rely on any one group to interpret the interests of all individuals. In fact, CD has drawn from proletarian internationalism the idea that “common sentiments and interests exist among citizens that are not reflected in the policies of their respective governments”.²⁶⁹ For example, Ulrich Beck points out that the slogan “citizens of the world, unite!” indicates that “the common interests of individuals can, in many cases, prevail over the divergent and antagonistic interests of their respective governments”.²⁷⁰

Yet the Marxist perspective limits these common interests to those of a single social class. Moreover, the idea of world citizenship does not have the objective of abolishing conflict among social classes; its aim is simply to provide some institutional forums where conflicts can be addressed. As mentioned, CD suggests institutional channels that would not be passive when faced with conflicts. Archibugi cites some examples of transnational campaigns that

²⁶⁸ Archibugi (2008), 133

²⁶⁹ “The Marxist view maintains that the strength of common interest uniting proletarians in different states is such that conflicts between proletariat states would be solved much more effectively than conflicts between bourgeois states.” *ibid*, 133-134

²⁷⁰ Ulrich Beck, ‘World Risk Society’ (Polity Press, 1999), 18, cited in Archibugi (2008), 134

have exerted pressure on political subjects and obtained results by influencing the choices of political decision makers.²⁷¹

Another argument against CD is that international institutions cannot be democratic. Those critics of the EU who do not believe that the institution is a democratic one support this view. Groucho Marx's famous quip, 'I refuse to join any club that would have me as a member',²⁷² has formed the basis for the most frequent criticism of the EU: "If the EU were to apply for membership in the EU, it would not qualify because of the inadequate democratic content of its constitution".²⁷³ Many observers have used this line of reasoning to argue that the EU is inherently incapable of being a democratic institution.²⁷⁴

As the EU is supposedly among the most democratic of international organizations,²⁷⁵ this criticism supports the contention that extending democracy beyond the nation-state is

²⁷¹ "...the decision of the UK government to follow environmentally friendly procedures for the disposal of the Brent Spar; the institution of the International Criminal Court; the decision of some multinationals to recede from their profit-making interests and allow for the free diffusion of the AIDS drug, or even military interventions to protect human rights." See more in Mike Prokosch & Laura Raymond (eds.), *The Global Activist Manual: Local Ways to Change the World* (Thunder's Mouth Press, 2002)

²⁷² Michael Zurn argues that international institutions may not fully meet democratic standards. Yet this does not mean that they cannot be democratic, as they increase the effectiveness of systems and the legitimacy of outputs and inputs. See his response to Groucho's argument: Michael Zurn, 'Democratic Governance Beyond Nation-State: The EU and Other International Institutions' (2000) 6 *European Journal of International Relations*, 183-221

²⁷³ Archibugi (2004)458

²⁷⁴ Kymlicka argues that even the EU could not reach transnational democracy as it is little more than an elite phenomenon. Will Kymlicka, 'Citizenship in an Era of Globalization: Commentary on Held' in Ian Shapiro & Casiano Hacker-Cordon (eds.), *Democracy's Edges* (1999)

²⁷⁵ 'EU represents a remarkable a distinctive form of democracy beyond borders': Ngaire Woods, 'Good Governance in International Organizations' (1999) 5 *Global Governance*, 39-61

difficult if not impossible.²⁷⁶ Robert Dahl has formed a list of minimum criteria for assessing intrastate democracy,²⁷⁷ concluding that the possibility of applying these criteria to international organizations is unrealistic. He therefore argues that global democracy is not possible,²⁷⁸ and asserts that international organizations cannot ever be as democratic as many states have become. He believes that “the idea of post-national democracy is misleading”.²⁷⁹

It could be acknowledged that Dahl’s scepticism is understandable when his criteria are applied to the global sphere. It might be difficult to implement these standards and expect them to become integral to international organizations in the short term. However, Dahl’s criteria do not comprise the core of democracy, but only constitute some of the means of achieving non-violence, popular control and political equality.²⁸⁰ Besides, although international organisations are less democratic than many of their member states, they should not be evaluated according to the same criteria.²⁸¹ In fact, such evaluation is more about determining the capacity of various systems to increase the level of democratic participation in response to complaints regarding the lack of control over executive decisions.²⁸²

It is understandable that Dahl is not opposed to the idea of international organizations or of increasing accountability and transparency. Archibugi disagrees with Dahl’s use of the word

²⁷⁶ Archibugi (2004) 458

²⁷⁷ See the list of these criteria: Archibugi (2008), 135

²⁷⁸ *ibid*

²⁷⁹ *ibid*

²⁸⁰ When Dahl’s criteria are compared with democratic values, their incompleteness becomes obvious. See democratic values: Archibugi (2008), 29-30

²⁸¹ Archibugi (2004) 458

²⁸² *ibid*

democracy, but it is more plausible to consider courses of action rather than semantics. The oft-cited apparent obstacles to the implementation of democracy at the international level may prevent the development of mechanisms for such implementation even when it is possible. At this juncture, Archibugi aptly emphasises that

*the situation should be avoided in which, in view of the difficulty of attaining democracy at the international level, we neglect to act to increase the legitimacy of the global decision-making process in those areas in which it would be possible.*²⁸³

What is more, the notion that the EU is not a democratic entity arises from high expectations. While the institution's level of democracy is very high compared to those countries with a large democratic deficit, that same level might not satisfy other states with higher standards of democracy. Of course, it cannot be argued that the EU represents the perfect democratic model, but neither can the positive influence of its activities on the developing democracy and accountability of states be ignored.

Communitarian and multiculturalist thinkers have also criticised CD for its possible threat to the identity of political communities. This fear leads them to argue that there cannot be a link between democracy and cosmopolitanism, as they regard any political system as able to represent only one or the other of these conditions.²⁸⁴ At the same time, they do not deny the challenges that have recently emerged in the international sphere. Kymlicka urges democratic states to consider such new problems as migration, financial flows, multi-ethnic communities

²⁸³ Archibugi (2008), p.137

²⁸⁴ Craig Calhoun, 'The Class Consciousness of Frequent Travellers: Towards a Critique of Actually Existing Cosmopolitanism' in Daniele Archibugi (ed.) *Debating Cosmopolitics* (Verso Books, 2003), 86-116 and Will Kymlicka, *Multicultural Citizenship* (OUP, 1995)

and minority rights. He also encourages these states to contribute positively to the global community's increasing humaneness by enhancing international human rights and boosting development aid. He believes that states should not be exempted from these responsibilities under the pretext of a new and undefined world order, holding that this would be hazardous as it would create a void between an existing state system that is presently insufficient but has the potential for improvement and a system that does not yet exist.

Kymlicka agrees with such demands for global responsibility. But while he does believe that institutional systems to tackle global problems should be developed, he thinks it would be more satisfactory to base such systems on existing states rather than establishing new entities on nascent mechanisms for involving individuals internationally.²⁸⁵ The state is presently an important component of the CD project. CD does not absolve states or individuals from global responsibilities. Kymlicka points to another objection to CD: the difficulty posed by the lack of a common language to global participation. He argues that "democratic politics is politics in the vernacular";²⁸⁶ he is concerned that individuals are more comfortable discussing issues their native tongues. However, it is mostly the elite classes who are able to speak more than one language fluently. It would therefore be difficult for all individuals to participate equally in a global institution. As there would be more one language in such an organisation, the lack of effective participation would render democracy impossible.²⁸⁷

²⁸⁵ Kymlicka (1999)112-126

²⁸⁶ *ibid*, 121

²⁸⁷ "genuine democracy is 'next to impossible' in multilingual states, because if people 'read and speak different languages, the united public opinion necessary to the workings of representative institutions cannot exist'." *Ibid*

However, Kymlicka seems to be oblivious of the fact that “far too many aspects of our daily lives escape the vernacular dimension, at the state level as much as at the global level”.²⁸⁸ He cites the very pertinent examples of the vernacular political dimensions of China, India and Switzerland, and asks rhetorically what part of the population is excluded from vernacular politics in countries such as the United States or Canada. The greater importance of global problems over those posed by language barriers could also be argued. This might be an issue that requires resolution, but it is not necessarily an obstacle that would prevent a global institution being founded.

As a summary of the responses to these criticisms, CD is now about 25 years old. One of its goals is to expand democracy both within states and in the global system. The successes that have been attained with regard to the former are indeed greater than those in the latter.²⁸⁹ Be that as it may, “one goal has been achieved: it is no longer sacrilegious to consider that democracy can be applied even outside the state”.²⁹⁰ There is no doubt that the development of democracy still has a long way to go, but CD is beginning to achieve its goals as time has made the circumstances more congenial for the implementation of the philosophy throughout the world.

²⁸⁸ Archibugi (2004), 460

²⁸⁹ Archibugi & Held (2011), 437

²⁹⁰ Archibugi (2008), p.3

CHAPTER THREE

Diagnosing the Problem: Examining the State-centric UNSC from the CD Perspective

3.1 What is wrong with the UNSC?

The current study presents criticisms of the UN Security Council. This does not mean that the Council is completely dysfunctional. The present study tries to find an alternative way to help the Council respond better to international peace and security issues. The aforementioned report of the International Commission on Intervention and State Sovereignty in 2001 aptly states that

*there is no better or more appropriate body than the United Nations Security Council to authorize military intervention for human protection purposes...The task is not to find alternatives to the Security Council as a source of authority, but to make the Security Council work better than it has.*²⁹¹

Critics are therefore enjoined to investigate ways of making the Security Council function better than it does.

The issue of Council reform provides a reminder of the demands to change the UN Charter in order to develop a more democratic, effective and accountable Council. These demands, which may be feigned to hide a deeper purpose, are ostensibly a call to the Council to be

²⁹¹ The report of the International Commission on Intervention and State Sovereignty, 'The Responsibility to Protect' (December 2001) 49

more accountable for its actions, but often express regret that the UN Charter is the only obstacle to this desirable outcome, as it purportedly does not permit other members either to stop the Council from taking decisions or to take action when the Council's power of decision has been blocked by a member exercising its power of veto. These critics have mostly blamed those two factors: the Charter and the power of veto. They have therefore generally continued to demand reform of the Council's structure to make it more democratic, effective and accountable.

However, it is by no means certain that this question should be taken at face value. The facts might differ to some degree from the way in which the critics present them. The contention that the member states cannot control the Council is certainly questionable, so it becomes futile to scapegoat the UN Charter or veto powers the Council's failures. The veto power is undoubtedly a problem, but not the only one.²⁹² As will be shown, there are alternatives by which UN members can overcome this obstacle. Yet it will also be demonstrated that a lack of consensus or of the ability to act independently has prevented the UN's members from employing these alternatives. It is concluded that state-based solutions such as removing the veto power or adding more states to the Council are pointless. It is necessary rather to focus on non-state based solutions that are more likely to enhance the Council's role.

Firstly, it is reasonable to assess the sources of the power invested in the UNSC to enable it to perform its functions. In accordance with Article 23 of the UN Charter, there are five permanent members, each with the veto power, and 10 non-permanent members with no veto

²⁹² Adam Roberts & Dominik Zaum, *Selective Security: War and the United Nations Security Council since 1945* (Routledge, 2009)

power. In fact, it is evident that this veto stipulated by the UN Charter gives any one permanent member the power to prevent the Council from taking a decision.²⁹³ Nonetheless, it is not something that cannot be overcome under the provisions of the current UN Charter. Article 27 states explicitly that all decisions, procedural or otherwise, should be taken by a majority of no less than nine Council members. It is thus clear that the five permanent members alone cannot take any decisions, and that the seven non-permanent members are able to block the Council from taking any decision. It is, however, not surprising that there has not been a single case in which the non-permanent members have exercised this power.²⁹⁴ The second concern often voiced is that the non-permanent members are not able to urge the Council to take action regarding any international issue. But this need not present a problem that cannot be overcome by the Uniting for Peace Resolution.

The authority emanating from the Uniting for Peace Resolution²⁹⁵ provides for General Assembly members to take an active role when the UNSC fails to resolve any particular international peace and security issue because of inefficiency or the exercise of the veto power. It means that the Council is not the UN's sole decision-making organ with regard to such issues. The General Assembly can in fact urge its member states to take action when the Council's permanent members cause deadlock. This resolution was adopted in 1950; its significance is that the UN had to some extent solved the veto problem just five years after its

²⁹³ Joost Pauwelyn, Ramses A. Wessel and Jan Wouters, 'When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking' (2014) 25 *European Journal of International Law*, pp.733-763, p.749

²⁹⁴ Kemal Dervis and Ceren Ozer, *A Better Globalization: Legitimacy, Governance, and Reform* (Washington 2005), p.55

²⁹⁵ The General Assembly Resolution 377 was adopted in 1950. This resolution states that "where the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security, the General Assembly shall seize itself of the matter". See Woolsey (n6), pp.129-137

establishment. Nevertheless, there are only a few weak instances in which the provisions of that Resolution were implemented: Korea (1950), the Suez Crisis (1956), the Congo Crisis (1960), the conflict between India and Pakistan (1971) and the Afghanistan conflict (1980).²⁹⁶ It was, however, forgotten in the case of the Rwandan genocide, and has not been applied to some current crises such as those in Palestine, Syria and Myanmar.²⁹⁷

It can thus be seen that non-permanent members of the Council can prevent its permanent members from taking any undesirable action²⁹⁸ and that the Assembly can assume final responsibility for taking action in any international dispute in which the Council has been rendered ineffective. It is also evident, however, that both of these capabilities have not properly been fulfilled by the UN's members. Even though the Uniting for Peace Resolution was practiced on a few occasions, even these depended on the consent of the big powers. It therefore does not follow to attribute blame solely to the UN Charter or the Council's permanent members; it must also be remembered that member states have their own power but cannot or do not choose to exercise it on their own authority.²⁹⁹ This is why the UNSC is

²⁹⁶ Hans Köchler, 'The Voting Procedure in the United Nations Security Council: Examining a Normative Contradiction in the UN Charter and its Consequences on International Relations' (1991) *Studies in International Relations*, pp. 16-17

²⁹⁷ *ibid*

²⁹⁸ For example, "in the cases of East Timor, Sierra Leone, and Haiti, the Security Council took enforcement actions after reaching the conclusion that the situations under review were threats to peace and security—a conclusion that is required to justify such action under the Charter. It seems quite clear, however, that there was very little danger to international peace and security in these isolated conflicts, where primitive armaments dominated and no major powers were involved. Yet the Security Council confirmed the necessity of action." Rich (n111), p.31

²⁹⁹ For example, Vijay Mehta states that: "Early in 2003, before the Iraq war began in 2003, an attempt was made to hold a debate. Some 59-member states were prepared to call for a meeting, although 96 members would have been required. The war came too soon for a debate. Another obstacle for many of the smaller members was a demand by the United States that they withhold their support for a vote, warning them of dire consequences in

in deadlock in significant international issues such as the current Syrian conflict and Ukraine crisis.

Be that as it may, the structure of the UNSC itself is hardly without its problems in this regard, at least to some degree. There might indeed be some possibility of enhancing the UNSC by restructuring the UN Charter. The veto power could be removed or limited. More members can be added, which could cause more problems or could alleviate them. These solutions are however subject to Articles 108 and 109 of the UN Charter that require the approval of the permanent members for any amendments to the UN Charter. Thus, such expectations would quite be hard to put into effect.

The primary question seems to concern the actors in the UNSC. Rather than focusing on state based solutions, a non-state approach should be adopted. It is more a question of the unwillingness or inability of member states to enhance the role of the UNSC: when one or more permanent Council members block the system, surprisingly the other 192 members simply feel obliged to respect this international institution.³⁰⁰ The main problem is therefore mostly the result of the members' inability rather than rules of the Charter. To illustrate this, member states have been warned by the superpowers that the UN might fall into a state of irrelevance similar to that which preceded the demise of the League of Nations during the

their relations with that country.” Mehta (2010) It is thus made clear how a superpower can exert pressure on other member states to withhold their authority

³⁰⁰ Tim Murithi, ‘Towards the Metamorphosis of the United Nations: A proposal for Establishing Global Democracy’ in Archibugi & others (2012), p.133

course of the Second World War.³⁰¹ This ominous warning was issued by the US in connection with its attempts to have UNSC resolutions passed authorizing the use of force in Iraq, or “legitimizing the occupation of Iraq”, *post festum (after the fact)*.³⁰²

The member states of the UN can be pressured by the big powers into restricting their actions to those of which the big powers approve. For example, on 19 November 2003 at Whitehall Palace in London, then-US President George W. Bush said that the UN was aware that its credibility “*depends on a willingness to keep its word and to act when action is required. America and Great Britain have done and will do all in their power to prevent the United Nations from solemnly choosing its own irrelevance and inviting the fate of the League of Nations.*”³⁰³ President Bush can be seen as having acted according to the dictates of his predecessor Theodore Roosevelt: speaking softly and carrying a big stick as he warned or threatened other UN member states. President Bush has thus made it explicit that UN member states may not take action independently without big power consent. If they do not wish to jeopardize their own interests, they might also prefer to remain silent. In this context, the USA, Russia and the other big powers may not be solely responsible for refusing to adhere to the common rules of international law.³⁰⁴ There are significant ideological or

³⁰¹ Hans Köchler, ‘The United Nations Organizations and Global Power Politics: The Antagonism between Power and Law and the Future of World Order’ (2006) 5 Chinese Journal of International Law, pp.323-340, p.333

³⁰² *ibid*, p.334

³⁰³ ‘Bush's Words to Britons: Both Our Nations Serve the Cause of Freedom’ The New York Times, 20 November 2003,

<http://www.colorado.edu/ReligiousStudies/chernus/4550ReligionWarPeace/Iraq%20War%20Readings/Bush%20Speech%20in%20London%2011-19-03.htm> accessed on 11/11/2014.

³⁰⁴ Stephen Jacobs & Marc Poirier, ‘The Right to Veto United Nations Membership Applications: The United States Veto of the Viet-Nams United Nations’ (1976) 17 Harvard International Law Journal, pp.581-608, p.606.

economic disagreements among UN members,³⁰⁵ so the organization has many times been wracked with dissension rather than being united in consensus.

In such an environment, the weakness of the UNSC is inevitable.³⁰⁶ Neither maintaining the current state-centric structure nor reforming it would make any sense without considering the inclusion of new agents. Hans Köchler pithily observes that “this leaves the United Nations trapped between a rock and a hard place when it comes to crucial matters of international peace and security”³⁰⁷ such as the ongoing crises in Palestine, Syria and the Ukraine. Member states are regrettably unable to enforce the rules of the UN Charter against the will of its most powerful members – nor, indeed, do they want to if they are to preserve their interests. In that respect, rather than attempting to reform the UNSC, it is essential to seek out new actors that would be able to act freely.

The balance of power may prevent the Council from fulfilling its duty properly, but at least it can play a deterrent role in international or domestic conflicts through the participation of new actors. Changing the UN Charter might be impossible in practice, and may not be a proper solution in any case, in light of the many democracy promises made by various UN pronouncements. Members have some right to challenge the Council and make the General Assembly the final decision-making organ. These rights are, however, dependent on the consent of the big powers, whose statements must be heeded by the other member states. They indeed have rights, but can only use them at the discretion of the big powers.

³⁰⁵ *ibid*

³⁰⁶ *ibid*

³⁰⁷ Köchler (2006), p.335.

This implies that the main problem concerns the willingness of states to dare to take risks against their interests. In this context, it does not seem that it would make any sense if other member states were to have further places on the Council. The Charter might have some impact on states' behaviour, but it is the positions of states that have the greater effect on their actions. The Security Council's failure is not purely a consequence of the UN Charter; it is more about the choices of decision-makers. Given this situation, while state actors are already on the scene, it is quite useless to pursue state-centric reforms. These independent actors would not be concerned about the pressure that powerful states could exert; they would be able to act autonomously.

The Council also has significant duties such as maintaining international peace and security, but states do not seem adequately to be able to perform these obligations due to their self-interested politics. This certainly implies that leaving such important responsibilities to a state-based system would be the equivalent of setting a wolf to guard the sheep.³⁰⁸ The former Secretary-General of the UN, Boutros-Ghali, has provided a clear, coherent theoretical framework for the future enrichment of global democracy, highlighting the fact that making the Council a more democratic and effective international actor would be possible by granting it considerable autonomy from the traditional fetters that the most powerful states have imposed on it.³⁰⁹

³⁰⁸ *ibid*, p.20

³⁰⁹ Boutros-Ghali, (2000), p.108

3.1.1 The State-centric System's Problem: Greed for Power, not Peace

It is frequently argued not only that states are the source of the world's problems,³¹⁰ but further that the "nation state" has begun to be considered as an obstacle in maintaining international peace and security in the post-Westphalian era.³¹¹ Criticisms about "the state-centric nature of the set of UN Charter principles because of its fundamental dissatisfaction with the Charter scheme as a foundation for global order" have been voiced.³¹² The UNSC system is in fact a club of nation-states; it is mostly handicapped when it comes to resolving disputes in the international realm. This might indicate that the Council's state-centric system is inadequate to face problems in international relations.³¹³ Such an inability should serve as a clear signal that Council has reached its systemic limits, and must consider changing its state-centric system in order to achieve both effectiveness and democracy.

Daniele Archibugi has proposed two hypocrisies by way of pointing out how difficult it is for a state-based system to be both democratic and compatible with the current international legal order.³¹⁴ The first of these hypocrisies, he maintains, has arisen through the Western democracies. The US, the UK and France in fact consider the UN as a tool for propagating their own "constitutional forms" into the international arena. They have had no compunction

³¹⁰ Peter Willets, 'From Consultative Arrangements to Partnership: The Changing Status of NGOs in Diplomacy at the UN' (2000) 6 *Global Governance*, pp.191-212, p.208.

³¹¹ Drake, (1999) p.243

³¹² Richard A. Falk, Samuel S. Kim & Saul H. Mendlovitz (eds.), *The United Nations and a Just World Order* (Westview Press, 1991), pp.8-9.

³¹³ For instance, the SC cannot afford to deal with problems of subnational groups or direct their grievances since the SC is unable to resolve 'disputes between illegitimate governments and the armed militia that seek to overthrow them through violent means'. Murithi (2012), p.134.

³¹⁴ Archibugi (2008) pp.156-164.

about appropriating “the right to block any decision regarding security”.³¹⁵ They have arrogated to themselves the “imperial privilege”³¹⁶ of being the permanent members of the UNSC with the veto power.³¹⁷ The Soviet Union seemed to be the more consistent actor by explicitly preventing the word “democracy” from appearing in the Universal Declaration of Human Rights.³¹⁸ That absence makes it cruel but not paradoxical that the major UN powers include authoritarian countries. On the other hand, it is both cruel and contradictory when democratic countries³¹⁹ are included.³²⁰

The second hypocrisy has arisen from the governments of developing countries. Even though they have continually demanded more democracy in the UN’s structure, accusing the organisation of not being responsive to the claims of weaker states, most of these governments have been reluctant to apply democratic principles within the boundaries of their own states. Harassment – and in some cases massacre – of their own peoples have therefore often accompanied their “anticolonial and anti-imperialist rhetoric”.³²¹ Their representatives do not have any credibility on this ground to demand democracy while ignoring it “in their own backyard”.³²²

³¹⁵ Ibid, p.157.

³¹⁶ In according to Archibugi, it is used in the literal sense of the term.

³¹⁷ *ibid*

³¹⁸ Hans Kelsen, ‘The Old and the New League: The Covenant and the Dumbarton Oaks Proposals’ (1945) 39 *AJIL*, pp.45-83.

³¹⁹ Such as USA, UK, Italy, France and etc.

³²⁰ Archibugi (2008) p.157.

³²¹ *ibid*

³²² *ibid*

As Archibugi states these two hypocrisies, they are not likely to allow headway to be made for a more democratic UNSC. They seek to advance their own interests rather than developing a more democratic organization that can promote international peace and security more effectively. And it is not necessarily reasonable to expect member governments to comply with or practice untried and untested democratic values that do not reflect the existing dynamics of power, irrespective of whether or not they have approved them.³²³ It is thus not to be expected that such actors will promote a more democratic UNSC. Even though they could manage to establish one, it would only be natural to expect them to continue their hypocritical positions by attempting to avoid applying these democratic values.

To further illustrate the hypocrisy of the members, there has been a debate about involving regional organisations such as the EU, the African Union (AU), Mercosur and the Arab League to the UNSC. However, even though the EU has been moving toward a common foreign policy, it is not surprising to see that some Western members of the UNSC have voted against the EU having a seat on the Council.³²⁴ When it is considered that this issue concerns the EU, not the UN³²⁵, it is not difficult to see how states would not be inclined to act on behalf of common interests or of a group. A self-interested state-based system is thus not a fit instrument for benefitting the UN's people or for complying with its purposes and principles. This question particularly concerns the UNSC, which bears the primary responsibility for the maintenance of international peace and security.

³²³ *ibid*

³²⁴ *ibid*

³²⁵ *ibid*

This issue of the permanent members' hypocrisy raises another significant issue. The powerful states have used the "democracy" argument many times to legitimate their military interventions through UNSC resolutions. Their goal has always been to increase their geo-political pressure in order to serve their interests.³²⁶ This is why they promote democracy across the globe in word but not in deed. The UK and France, two of its permanent members, also belong to the EU, which consistently underlines the importance of democracy in its member states. Another permanent member, the US, claims to desire and promote democracy - indeed, to the extent that it can even declare a war against any entity for democracy's sake. France's reaction to the Rwandan genocide in 1994 was frankly irresponsible. President Francois Mitterand said, "In such countries, genocide is not too important..."³²⁷ There are cases such as Palestine, Syria and the Ukraine in which the Council has failed to take effective responsibility.

The Palestinian case in particular raises many issues, but one outstanding example shows how the US, supposedly the world's leading promoter of democracy, could challenge a democratic step under the auspices of the UN. It has withdrawn funds from UNESCO after Palestine was upgraded to non-member observer status in the General Assembly.³²⁸ It is politically understandable that the US voted against this, yet it is hardly to be comprehended that the country took such a drastic step as to cut funds from a democratically elected entity.

³²⁶ Muriithi (2012), p.133

³²⁷ France's reaction to the Rwandan genocide in 1994 was frankly irresponsible. President Francois Mitterand said, "In such countries, genocide is not too important..." Words attributed to French President Francois Mitterand, reported by Philip Gourevitch in *Reversing the Reversals of War*, The New Yorker, 26 April 1999. http://africanhistory.about.com/od/rwanda/p/qts_Genocide1.htm accessed on 10/07/14

³²⁸ The Guardian, 'US pulls UNESCO Funding after Palestine is Granted Full Membership' <http://www.theguardian.com/world/2011/oct/31/unesco-backs-palestinian-membership>

The Syrian case involves two types of hypocrisy as outlined by Archibugi. First, the UNSC undertook military operations against Gaddafi in Libya in 2011 after expressing its concern about “protecting civilians, the escalation of violence, and the heavy civilian casualties” in that country.³²⁹ When violence escalated in Syria, with resultant heavy civilian casualties, it was widely expected that the Council would respond likewise to that situation.³³⁰ Yet a single effective action has yet to be taken in that case. The second hypocrisy is that many Middle Eastern countries who have called on the Syrian government to establish democratic principles and negotiate with anti-government movements are hardly in a moral position to do so, responding violently as they do to any demands for democracy from their own citizens.

However, whilst the major powers maintain their desire for democracy throughout the world, their actions betray their detestation of the concept in the context of the UNSC. Murithi asserts that “this is one situation in which the UN Charter came under direct threat from the dogmatic interests of powerful permanent members of the UNSC”.³³¹

Of course, other permanent members are hardly blameless. The case of the Ukraine could be cited as the clearest demonstration of how Russia has used military intervention in order

³²⁹ UN Security Council Resolution 1973(2011), S/RES/1973(2011)

³³⁰ In the meanwhile, I do not discuss the necessity of applying military operation, here, I just illustrate hypocrisy example.

³³¹ *ibid*

pretend to preserve the Crimea's rights. And Russia and China has now been preventing the UNSC from intervening militarily in Syria to protect civilians for years.³³²

This problem of hypocrisy renders nation-states incapable of acting to maintain international peace and security. While a particular state can be highly sensitive to the security of its own people, the same does not even vaguely pay attention to that of other countries' peoples. States can sometimes even apply a double standard, favouring its native-born citizens against its immigrant ones in terms of human rights. The UNSC should not be a place in which governments hypocritically proclaim one set of values while practising another.³³³ It should also not be a vehicle to disguise the pursuit of power politics. It is thus entirely plausible to maintain that commending international peace and security to nation-states is dangerous and hopeless.

³³² It does not mean that this proposal complain about why the SC do not take military action in Syria, contrary to this, this proposal offers to apply always peaceful means as much as possible. Ergo, it is aimed to illustrate how a state could react differently and how a state's sensibility can vary unfairly in the sense of hypocrisy.

³³³ Roberts & Kingsbury, p14.

3.2 Democracy in the Context of the UNSC

*“In the Security Council, the five-country right to veto is a breach of all conventional democratic principles...”*³³⁴

*“The exclusive character of the Security Council veto was anathema to any notion of democracy.”*³³⁵

The international legal order is a system that provides a framework that encourages international agents to maintain their affairs as stably as possible.³³⁶ The rules of the international legal order regulate international agents’ interactions, moderate their conflicts and provide a mechanism for resolving their disagreements.³³⁷ These rules also form a common basis for international peace and security.³³⁸ They may vary from time to time. For example, the previous formative principles were that states were the only significant actors³³⁹, recognition of a new actor depended on “territorial integrity” and “political independence”, the maintenance of international order was based on “collective security”, it was possible for states to control all other actors, both individuals and groups³⁴⁰, and democracy was a strictly national issue.³⁴¹

³³⁴ Archibugi (2008), p.93

³³⁵ Chuchai Kasemsarn, representative of Thailand, Press Release GA/9944, Fifty-sixth General Assembly Plenary 35th Meeting (PM) <<http://www.un.org/News/Press/docs/2001/ga9944.doc.htm>> accessed on 05/06/2014

³³⁶ *ibid*

³³⁷ *ibid*

³³⁸ Fred L. Morrison, ‘Public International Law: An Anchor in Shifting Sands’ (2004) 22 Law & Inequality p.337, 337

³³⁹ Article 34(1) of the Statute of the International Court of Justice: “Only states may be parties in cases before the Court”

³⁴⁰ *ibid*

³⁴¹ Therien & Belanger-Dumontier (n159), p.371

However, the international legal environment has evolved remarkably in several respects such as the introduction of new actors, new problems and new inventions. For example, the major organization, the United Nations, has increased its membership from 51 states to nearly 200, while the world's population has risen from about 2.5 billion to approximately 7 billion. It is necessary for the international legal order to adjust to this new environment. For Fred Morrison, this order is not an immutable body of rules; it is a living system and it should respond to the changes brought about during the past century.³⁴²

The question of whether the UNSC must be more democratic must be answered in the affirmative when the realities of the current world order are considered. The Council was established and its permanent members were empowered by veto power to control their aggressive actions for the sake of preventing a third world war.³⁴³ Yet there are significant differences between 1945 and the modern world. If the main reason for the Council's structure was to prevent international conflicts, new threats such as global environmental degradation, refugee flows and mass cross-border migration, the spread of infectious diseases, global terrorism and transnational crime have manifested themselves in the meantime.³⁴⁴ These threats could be as serious as any possible conflict among the permanent five. As new global threats have emerged, the UN has also become essential for the national security of big powers.³⁴⁵ The UNSC must therefore restructure its system in response to these threats. The way to effect this is to make the institution more democratic.

³⁴² Morrison (2004), p.338

³⁴³ "The veto was originally viewed as a device to insure the unity of the "big powers" on actions taken by the United Nations in matters of great importance." Jacobs & Poirier (1976), p.603

³⁴⁴ *ibid*

³⁴⁵ The U.S. Ambassador to the UN, Susan Rice, told a House subcommittee: "As we all know, America's resources and influence are not limitless. That's why the United Nations is so important to our national

Democracy in the UN, particularly in the UNSC, could be seen as a contentious issue. Barry Holden sees that ‘what global democracy is, and to what extent its existence is likely or desirable, are matters about which there is considerable controversy’.³⁴⁶ Such dissension might be due to the fact that, on the insistence of the USSR, the UN Charter does not use the word “democracy”; instead it refers to some of its principles.³⁴⁷ Democracy was apparently sacrificed on the altar of the Soviet Union’s ideological purposes. If democracy had been directly mentioned in the Charter, it would perhaps have paved the way for the quicker development of a more democratic UNSC by possibly making it easier for arguments to be based on it and for other authorities to demand more democracy in the Council. Of course, it would also thereby make the idea less controversial.

Secondly, while the enrichment of democratic culture is seen as a first step towards democratization³⁴⁸, there are significant contradictions between the Charter and the Council’s practices, preventing the development of a democratic base and making it difficult to picture a practicable democratic structure. Principles of democracy are outlined in the UN Charter, yet these have been arbitrarily interpreted by the permanent members of the UNSC.³⁴⁹ The lack of a clear, widely acknowledged theoretical frame of reference also makes democratic reforms more difficult. Lastly, when member states call for a more democratic Council, the

security.” Michele Kelemen, ‘U.N. Chief On Africa Clashes: Doing Our Proper Work’ (7 April 2011) <<http://www.npr.org/2011/04/07/135199163/u-n-chief-visits-u-s-aims-to-safeguard-funding>> accessed on 02/06/15

³⁴⁶ Holden (ed.), *Global Democracy*, p.1.

³⁴⁷ Daniele Archibugi, “Democracy at the United Nations,” in Takashi Inoguchi, Edward Newman and John Keane (eds.), *The Changing Nature of Democracy* (United Nations University Press, 1995)

³⁴⁸ Daniele Archibugi, Sveva Balduini & Marco Donati, ‘The United Nations as an Agency of Global Democracy’ in Holden (2000) p.140.

³⁴⁹ Köchler, (1991), p.18

aim of such demands is more often than not to gain advantage under the guise of democracy rather than to actually democratize the UNSC. It can therefore be said that “the commitment to democratization is, however, stated in terms of pragmatism rather than of a comprehensive and long-term political project”.³⁵⁰ Under these circumstances it is hard to define a concept of democracy for the UNSC.

The World Commission on Culture and Development’s report *Our Creative Diversity* states that “as we enter the twenty-first century, it is time to restore the supremacy of the people in international organizations on the same lines as it is at present being restored within nations all over the world”.³⁵¹ A principle of democracy also enshrined in the Universal Declaration of Human Rights adopted by the General Assembly in 1948. The concept of democracy is eloquently expressed in Article 21(3) of the Declaration³⁵² in the phrase “the will of the people shall be the basis of the authority of government...”.³⁵³

While the UN Charter and its statements such as the Universal Declaration of Human Rights have embraced some principles of democracy in theory, they have been applied ambiguously rather than by adhering to the purposes for which they were made.³⁵⁴ In this context, as *Our Creative Diversity* observes, “fifty years ago, the United Nations was created in the name of “We, the Peoples”, yet, people did not have too direct a say in the operations of the United

³⁵⁰ *ibid*

³⁵¹ World Commission on Culture and Development, ‘Our Creative Diversity’ (1995)

<<http://unesdoc.unesco.org/images/0010/001055/105586e.pdf>> p.62

³⁵² See the Universal Declaration of Human Rights: <http://www.un.org/en/documents/udhr/>

³⁵³ Democracy and United Nations: http://www.un.org/en/globalissues/democracy/democracy_and_un.shtml accessed on 18/02/2013

³⁵⁴ *ibid*

Nations as governmental representatives took over all its organs, including the General Assembly and the Security Council”.³⁵⁵

In fact, four significant factors have motivated the UN to include global democracy on its agenda: the end of the Cold War, the third wave of democratization, globalization and the influx of new international actors.³⁵⁶ The UN has thus changed its attitude to the notion of democracy. However, it has only been partially successful of idea and making up a historical backdrop³⁵⁷ since no significant development regarding the practice of democracy is evident. Jacobs and Poirier aptly point out that “despite the cooperative goals espoused in the Charter, the United Nations is a political institution in which members are pursuing their national interests as they see them”.³⁵⁸ Bertrand likewise indicates that attempts by states to democratize the UN have remained largely theoretical, without a general commitment to their implementation.³⁵⁹

The UNSC has accordingly also struggled between stated principles and their practical application. Firstly, the Council was set up to maintain international peace and security, but the history of international conflicts shows that the Council’s permanent members in particular have been involved in many conflicts, either by inciting the parties concerned

³⁵⁵ World Commission on Culture and Development, ‘Our Creative Diversity’ (1995) <<http://unesdoc.unesco.org/images/0010/001055/105586e.pdf>> pp.61-62.

³⁵⁶ Therien & Belanger-Dumontier (n159), p.358

³⁵⁷ *ibid*

³⁵⁸ Jacobs & Poirier (1976) p.606

³⁵⁹ Maurice Bertrand, ‘The Historical Development of Efforts to Reform the UN’ in Adam Roberts & Benedict Kingsbury (eds.) *United Nations, Divided World: The UN's Roles in International Relations* (OUP 2nd ed., 1993), pp.420-436, p.436; Adam Roberts & Benedict Kingsbury, ‘The UN’s Roles in International Society since 1945’ in Roberts & Kingsbury (1993), p.14

(generally indirectly) or by directly intervention. Archibugi states regarding the UN's general condition that the practices of influential members are sufficient to demonstrate that "this is a formal principle that is not upheld in practice".³⁶⁰ It is thus essential to reconsider who implements the UN's rules.

Article 2(1) of the UN Charter speaks eloquently of the need to act in accordance with democratic principles: "the Organization is based on the principle of the sovereign equality of all its Members". The veto power is thus a legal abuse that has no possible democratic justification.³⁶¹ In this regard, Hans Köchler also maintains that "the co-ordination of policies at the global level should be organized in a democratic way, something that is also required under the UN Charter's principle of sovereign equality".³⁶²

In addition to this, the United Nations might principally be an organization of sovereign States. However, the Charter has also provided an indispensable system that offers cooperation with governmental or non-governmental actors.³⁶³ Chapter VIII of the UN Charter consists entirely of regional arrangements; Article 54 in particular is devoted to the UNSC's cooperation with regional arrangements and agencies in maintaining international peace and security. Article 57 is generally devoted to the UN's international economic and social cooperation with special agencies, while Article 71 also authorizes the ECOSOC to make directly arrangements for consultation with non-governmental organizations (NGOs) in

³⁶⁰ Archibugi (2008)

³⁶¹ *ibid*, p.134

³⁶² Hans Köchler, 'The United Nations Organization and International Legitimacy Reflections on the Role of the Security Council' (2010). Statement delivered at the VIIIth Annual Session of the Rhodes Forum organized by World Public Forum "Dialogue of Civilizations" pp.1-2

³⁶³ Archibugi (2008) pp.110-111.

order to increase its capabilities. Examination of the UN's principle organs reveals more promise in the General Assembly's, ECOSOC's and the Secretariat's embracing of popular entities.³⁶⁴ The UNSC and the International Court of Justice (ICJ), by contrast, have remained reluctant to formally involve NGOs.³⁶⁵

From the UN's inception its provisions have allowed for the establishment of interaction and cooperation with new actors. The UNSC has, however, failed to make any formal contact with new actors, as fundamentally required if the Council is to be democratized. Boutros-Ghali maintains that international democratization is possible by including all actors in international decision-making systems such as those in the developed and developing worlds, rich and poor, North and South, as well as giving voice to new actors.³⁶⁶ The Council has practical problems, while the Charter is quite suitable for establishing and maintaining relations with recently arrived entities.

The preamble of the Charter also begins with "we the peoples of the United Nations...", stating that "when decisions will be reached by means of a truly participatory process"³⁶⁷ and referring to peoples rather than states. Thus, as a reflection of the fundamental principle of democracy, the UN should not be limited to a states-only entity; rather, it should represent all

³⁶⁴ ECOSOC has granted 'consultative status' for NGOs. See the Article 71 of the UN Charter. Significant numbers of regional organizations participate in the sessions of the General Assembly with permanent observer status to provide consultation and diplomatic and operational support for peace and security. The Secretary General has underlined the importance of NGOs and the willingness to work with them; for instance, see A/53/170: Report of the Secretary-General

³⁶⁵ In fact, the Council could also establish a subsidiary organ under the Article 29 of the UN Charter

³⁶⁶ Archibugi (2008) pp.109-110

³⁶⁷ Colonel J.G.J.C. Barabé, 'The Security Council Reform: The Effectiveness-Democracy Tug-of-War' (2000) 2 National Strategic Studies Course, p.113

people's associations such as regional organizations³⁶⁸, developing nations, unrepresented peoples³⁶⁹ and NGOs. Yet, the UN has traditionally seen itself as forum for sovereign states alone.³⁷⁰ This might be because power rather than democratic principle seems to be the dominant dynamic in such interstate relationships, as the principles were interpreted by and on behalf of states.

Nevertheless, in the context of the UN, the term “democracy” has at times been used to refer to an inter-state project whose aim is to grant all states, large or small, the greatest chance to participate in global decision-making based on the principles of the UN Charter.³⁷¹ Yet, this discourse has been affected by recent international developments, resulting in the notion of democracy beginning to take on a broader resonance that also addresses the demand to provide formal participation to non-state actors such as NGOs, the private sector, local authorities and parliamentarians.³⁷² The UN's policies have fostered more participation by non-state actors in the organization's deliberations and operations,³⁷³ so there is a strong case that the UN's policies have developed the idea of a “democracy without borders” by promoting the greater inclusion of global constituencies in world politics.³⁷⁴

³⁶⁸ e.g. ASEAN, the AU or the EU

³⁶⁹ Peoples of occupied or unrecognized nations such as Turkish Republic of Northern Cyprus, Palestine, Taiwan and Western Sahara

³⁷⁰ Therien & Belanger-Dumontier (n159), p.360

³⁷¹ Therien & Belanger-Dumontier (n159), p.356.

³⁷² *ibid*

³⁷³ *Ibid*, p.357.

³⁷⁴ *Ibid*, pp.357-358.

In that respect, UN leaders have often proclaimed that “the globalization of democracy is a trend consistent with recent structural changes in the world order”.³⁷⁵ The UN considers “democracy as a universal right and a source of legitimacy”.³⁷⁶ Additionally, the UN also indicates the demand for “a stronger engagement of civil society, business, and other global constituencies in world affairs”.³⁷⁷ The organization has therefore increasingly allowed non-state actors to take part in UN deliberations.³⁷⁸ The UN has, however, failed to develop a similar case for democratic UNSC reform, since the majority of Council reform proposals have focused on simple growth.³⁷⁹ The most thoroughgoing of these proposals still do not transcend state-based solutions.³⁸⁰

However, it seems that these problems regarding the Council’s effectiveness and accountability have to do with the balance of power within the institution. In other words, reform proposals are focused mostly on balancing the veto power rather than enhancing the Council’s functions. For Archibugi, democracy is the most efficient way to enhance the Council. Yet he also points out that it should not be used only to balance and manage power, but also to develop the Council’s functions.³⁸¹

³⁷⁵ Therien & Belanger-Dumontier (n159), p.371.

³⁷⁶ *ibid*

³⁷⁷ *ibid*

³⁷⁸ “...because they are involved in a growing number of UN-sponsored operational partnerships, non-state actors have also been able to strengthen the output-based legitimacy of the world body.” *ibid*, pp.371-372.

³⁷⁹ Center for UN Reform Education, ‘Security Council Reform’

<http://www.centerforunreform.org/?q=securitycouncil>

³⁸⁰ Winkelman (1997), pp.35-90; Cox (2009), pp.89-128; and Kelly (2011) pp.319-407; Melanie Zorn, ‘The United Nations Security Council: Reforms Concerning Its Membership’ <www.centerforunreform.org>.

³⁸¹ Held, ‘Principles of Cosmopolitan Order’ (2010), p.183

3.2.1 Parameters of the Democracy Concept for the Security Council

As there is no agreed definition of democracy in international law, a variety of interpretations could exist according to circumstances, such as who is defining the term and the context in which they are doing so.³⁸² This might be because of the paucity of theoretical work in defining and discussing democracy in the context of relations among rather than within states.³⁸³ Neither the theoretical literature nor the historical experience of democracy between states has been developed and consolidated.³⁸⁴ There is thus not a sufficiency of successful democratic international organisations,³⁸⁵ and those that do exist consequently have no adequate theoretical foundation in terms of democracy.³⁸⁶

It must first be determined what it means to “make the Security Council more democratic”. The Council is expressly not a democratic body when the UN Charter³⁸⁷ and its actions are considered.³⁸⁸ The phrase cannot therefore mean to develop the Council’s democratic profile as though it was already democratic entity. Nor does it mean directly developing a fully democratic Council. “Making the Council more democratic” refers to introducing some democratic instruments into the Council at least to increase its level of democracy in order to pave the way for the development of a pure democratic Security Council.

³⁸² “While international law appears to have embraced the idea of democracy, it has not yet articulated a detailed normative framework or an extensive body of practical rules defining the meaning of democracy.” Varayudej (n110), pp.14-15

³⁸³ Archibugi, Balduni & Donati (2000), p.126

³⁸⁴ Crawford (1993), pp.113-133

³⁸⁵ *ibid*

³⁸⁶ *ibid*

³⁸⁷ For example, see Article 23(1), 27(3), 108

³⁸⁸ “The SC represents the most extreme form of intergovernmental oligarchism. The UN is an antidemocratic entity.” Archibugi (2008), p.161 and p.183

James Paul and Céline Nahory state that “critics of the Council made seven demands – that the Council be: (1) more representative, (2) more accountable, (3) more legitimate, (4) more democratic, (5) more transparent, (6) more effective and (7) more fair and even-handed (no double standards)”.³⁸⁹ A more “democratic” body might refer to one that is more representative and fair and even-handed, while more “accountable” could mean more legitimate and transparent. These demands can thus be reduced to a Council that is more democratic, effective and accountable.

In fact there is a strong relationship between demands for democracy and those for effectiveness and accountability. Delbruck notes that some concepts are related to the concept of democracy, or indeed depend on its definition. He thus stresses that transparency and accountability are essential to democracy.³⁹⁰ In this context, Archibugi and Held also maintain that accountability, representativeness, transparency and participation are key democratic values.³⁹¹

David Held also maintains that “systematizing the provision of global public goods requires not just building on existing forms of multilateral institutions, but also on extending and developing them in order to address questions of transparency, accountability and democracy”.³⁹² It is clear that democracy and accountability are complementary concepts, as

³⁸⁹ James Paul and Céline Nahory, ‘Theses Towards a Democratic Reform of the UN Security Council’ (2005) Global Policy Forum

³⁹⁰ Jost Delbruck, ‘Exercising Public Authority Beyond the State: Transnational Democracy and/or Alternative Legitimation Strategies’ (2003) 10 *Indiana Journal of Global Legal Studies*, pp.29-43, p.31

³⁹¹ Archibugi and Held (2011), p.436

³⁹² David Held, ‘Democratic Accountability and Political Effectiveness from a Cosmopolitan Perspective’ (2004) 39 *Government and Opposition*, pp.364-391, p.376

they are usually treated together. It is therefore obvious that a more democratic Security Council ought also to be a more accountable one.

The question of democracy for the Council can be regarded as being raised when it is ineffective and not accountable. The more the Council fails to take action regarding international crises, the more insistently do the UN's member states raise the issue of reform, goaded by the Council's inability to act because of the veto.³⁹³ In this regard, the Council has often been accused of inefficiency in cases of genocide, war and conflict.³⁹⁴ These failures to fulfil its significant responsibilities have made the Council the target of severe criticisms regarding its undemocratic nature.³⁹⁵

The Council's failure in Syria was due to Russia's and China's application of the veto to block a resolution that would have allowed meaningful action against the Syrian regime. Such reactions by states to these Security Council failures signifies that the veto has made the Council's current system undemocratic, and it therefore needs to be reformed in order to increase its capacity to maintain international peace and security. Calls for a more democratic or more representative Council have thus stemmed from the Council's inefficiency. The underlying reason for a more democratic Council is its systemic inability to take action. Put another way, its inefficiency can be redefined as the non-democratic nature of its system.

³⁹³ Hans Köchler, 'Security Council Reform: A Requirement of International Democracy' (2007) International Progress Organization, p.2

³⁹⁴ "The UN has failed to stand up to dictators and perpetrators of genocide." Its failure to halt the Rwandan genocide in 1994, its failure to stop the humanitarian crisis in Sri Lanka and failure maintain peace and security in Syria crisis 'are a few examples of its impotency on the major issues of the day'. Mehta (2010) p.3

³⁹⁵ Köchler (N 311)

Another issue is that demands for reform have been based on making the Council more democratic by adding new members to increase its representativeness, effectiveness and accountability. Thus, these demands for a more democratic Council inevitably entail a more representative, effective and accountable one. So making the Council more democratic caters for these desires for its increased effectiveness and accountability.

The absence of a democratic structure has nevertheless meant that the Council's dealings with international problems have mostly been failures because of this ineffectiveness and lack of accountability. There is most likely no way other than democratization that would enhance the Council's function. For Boutros-Ghali "democratization at the international level has become an indispensable mechanism for global problem-solving in a way that is accountable and acceptable to all and with the participation of all concerned".³⁹⁶ The immediate implementation of such a democratic mechanism in the Security Council is perhaps not to be expected; yet the foundations of a democratic Council could – and should – at least be laid in order for it to efficiently fulfil its obligations.

The Council's main problem is its lack of proper responses to international peace and security issues. In other words, it does not efficiently fulfil its main duty: to maintain international peace and security. Issues such as inefficiency, lack of accountability and a lack of representativeness have been raised in that respect. These three concepts draw attention to the need for the Council to be more democratic so as to overcome these problems.

³⁹⁶ Barabé (2000) p.107.

Moreover, it is not necessary for this to be considered as a reform proposal because it does not require any Charter amendments.³⁹⁷ This can be understood primarily with reference to the invention of UN peacekeeping forces in the field of security in 1956.³⁹⁸ This has been a fundamental UN reform effected without altering the organisation's Charter.³⁹⁹

The word "reform" in that context is different from its use in the demands for Council reform: "the word reform has never been used in this connection".⁴⁰⁰ Bertrand gives another example, stating that comprehensively implementing the provisions of the UN Charter has also never been regarded as reform. For example, Article 43 delegates authority for special agreements on the assignment of military forces to the Security Council and Article 47 allocates major responsibilities to the Military Staff Committee. Whenever any of these articles is implemented, significant UN reform as proposed by Secretary-General Boutros-Ghali would result.⁴⁰¹ Yet such proposals have been described as revitalization rather than reform.⁴⁰² Implementing present structure effectively, in other words, does not refer to reform.

In fact, both reform and revitalization aim to enhance the Council's role. However, revitalization concerns the more efficient use of current Charter instruments. The present

³⁹⁷ This is explained in more detail in Chapter VII

³⁹⁸ It was established on the initiative of Lester Pearson and Dag Hammarskjöld. See more at <http://www.un.org/en/peacekeeping/missions/past/unef1backgr2.html> > 28/01/2015

³⁹⁹ Bertrand (1993), p.421

⁴⁰⁰ *ibid*

⁴⁰¹ *ibid*, pp.421-422

⁴⁰² *ibid*, p.422

proposal likewise does not require any Charter amendments,⁴⁰³ as it can be put into practice under that Charter's Article 29⁴⁰⁴, Rule 39 of the Provisional Rules of Procedure of the Security Council⁴⁰⁵ and the Appendix to the Council's Provisional Rules of Procedure.⁴⁰⁶

The proposal is thus deliberately circumscribed as it opens the way for democracy. It does not aim instantly to produce a purely democratic Council, but rather to fulfil certain conditions preparatory to the development of an ideal Security Council. The effect of these limitations on the study's purpose is to minimize the possibility of failure in its implementation by its embodiment of a progressive approach. Limiting the parameters of the concept of "making the Security Council more democratic" in this way makes it more possible to develop a more democratic Council.

According to the tenets of CD, it is essential for an international entity to open its doors to new non-state actors in order to be more democratic at the international level. The application of such tenets provides assurance that democracy is representative, accountable and effective. It is the argument of this study that the only possibility of attaining democracy is by taking into account the new actors in international legal order. The Security Council will eventually become more accountable, effective and representative. It is therefore also argued that would be a more democratic entity by granting formal access to NGOs. By doing so, it demonstrates that it would erode the Council's conservatism and would make enable it to coexist with the

⁴⁰³ This point is discussed in detail in the Chapter VII

⁴⁰⁴ The Security Council could establish subsidiary organs for the sake of its performance and functions

⁴⁰⁵ The Security Council could invite other individuals

⁴⁰⁶ The Security Council is able to receive written statements from non-governmental bodies

world's altered realities.⁴⁰⁷ However, if the Council were to insist on compliance with the specific terms of its existed structural instrument, it would become irrelevant and eventually become defunct. In short, a system mired in the circumstances of its creation in 1945 would doom the Council to failure. The Council must therefore accommodate itself to changing circumstances. The author believes that a progressive approach would make this possible.

⁴⁰⁷ "To remain within the changed realities of the world, the original organization and its rules had to change."
Morrison (2004), p.339

CHAPTER FOUR

Introducing NGOs: Their Legal Status, Significance and Definition

4.1 Identifying NGOs⁴⁰⁸ as Significant Partners in the Post-Westphalian Era

The argument of this work is that formal participation of NGOs on the Security Council is essential to increase the Council's capabilities. To this end, the importance of NGOs as actors in the international realm must be demonstrated, which can help understand why these entities deserve a place in the mechanism of the Security Council. In this regard, Charnovitz's theory of the "empowerment" period of NGOs, classifying seven historical periods of NGO development, is explained.⁴⁰⁹ In particular, this "empowerment" period since 1992 supports the growing impact of NGOs on the international legal order. Also explained is the problem of defining NGOs; such a definition is arrived at for the purpose of the study in order to eliminate uncertainties about which NGOs should be granted formal access to the Council.

In terms of the "New World Order" that began after the Cold War, international participatory democracy appears to be an irreversible process. NGOs have continued to markedly increase their role in global politics primarily through globalization processes.⁴¹⁰ Some radical suggestions have been made about NGOs taking a more active part preparatory to positive law being applied to them in a world order in which civil social actors have increasingly

⁴⁰⁸ International People's Organizations (IPOs) usually referred to as non-governmental organizations (NGOs). Galtung (2000), pp.145-146

⁴⁰⁹ Charnovitz (1997), pp.183-286

⁴¹⁰ Miretski (2009), p.3

participated in the formation and control of international law.⁴¹¹ Examples of the major influence of NGOs includes their participation in the preparation of the conventions on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-personnel Mines and on Their Destruction, the Rights of the Child, the Convention to Combat Desertification, on International Trade in Endangered Species and the establishment of the International Criminal Court (ICC).⁴¹²

Boutros-Ghali states that “international relations” should not be considered solely as relations between sovereign states, pointing out that international relations have been shaped not only by nations but also by an increasing array of non-states actors, “ranging all the way from individual persons to civic associations, non-governmental organizations, local authorities, private multinational business, academia, the media, parliamentarians and regional and international intergovernmental organizations”.⁴¹³

The presence of NGOs in the international sphere may date back to the 6th century, but their increased influence has become especially obvious since the Cold War.⁴¹⁴ Steve Charnovitz classifies the development of NGOs into seven historical periods. NGOs began to emerge

⁴¹¹ *ibid*

⁴¹² Karsten Nowrot, *Global Governance and International Law* (2004), p.11. For more examples of the participation of NGOs in the international lawmaking and law enforcement process, see Kal Raustiala, ‘The Participatory Revolution in International Environmental Law’ (1997) 21 *Harvard Environmental Law Review*, pp.537-586

⁴¹³ Boutros-Ghali (2000), p.108

⁴¹⁴ “As the earliest examples of international NGOs, one can probably point to the Christian churches and their spiritual and secular orders that formed in the 6th century A.D. and represented the only private transnational networks at that time.” Karsten Nowrot ‘Legal Consequences of Globalization: The Status of Non-Governmental Organizations Under International Law’ (1999) 6 *Indiana Journal of Global Legal Studies*, pp.579-645 and 581-82

between 1775 and 1918 and were able to make engagements from 1919 to 1934. A period of disengagement followed, from 1935 to 1944, but Charnovitz describes the following five years as a time of “formalization”.⁴¹⁵ Next came two periods, of “underachievement” (1950-1971) and “intensification (1972-1991), before the current time of “empowerment” beginning in 1992.⁴¹⁶

Charnovitz’s current empowerment period has seen an increasingly strong impact on the international realm. Alvarez also maintains that “although the impact of NGOs on legal development ebbs and flows, no one questions today the fact that international law – both its content and its impact – has been forever changed by the empowerment of NGOs”.⁴¹⁷ NGOs have thus started to take more active roles in the decision-making organs of international organizations.

First and foremost, even though NGOs do not have rights equal to those of states or international organisations, they have occupied significant positions in international law and international relations,⁴¹⁸ a development that an absence of formal rights has not been able to prevent.⁴¹⁹ NGOs have also been regarded as “non-negligible partners” of governments and

⁴¹⁵ For example, NGOs have been granted formal licences under the Article 71 of the UN Charter

⁴¹⁶ Charnovitz (1997), p.190

⁴¹⁷ Jose E. Alvarez, *International Organizations As Law-Makers* (OUP, 2005), p.611

⁴¹⁸ Santivasa (n198), p.378

⁴¹⁹ For example, NGOs have initiated and been the driving force behind the conclusion of international treaties such as the 1984 Torture Convention and its 2002 Optional Protocol, as well as the UNIDROIT Convention on Mobile Equipment. They have *locus standi* before some international courts and bodies such as the African Court of Human Rights and the Inter-American Human Rights Commission (IACommHR), and can appear before the Inter-American Court of Human Rights (IACtHR) with the consent of victims. They can submit

inter-governmental organisations once they have attained both informal and formal access in the decision-making processes of international organisations, in particular when issues are common and of benefit to the international community.⁴²⁰

The report of the Secretary-General of the UN on development and international cooperation says that NGOs have undertaken numerous projects valued at more than \$7 billion annually.⁴²¹ This report summarised the importance of NGOs to the global community. It characterized NGOs in these terms:

- *able to stay active for a long time in the search for peace*
- *have always been at scene of conflicts at an early stage*
- *have made crucial contributions to the immediate relief of stricken populations*
- *have laid the foundations for the reconstruction of war-torn societies*
- *have led the new global networks*
- *have flexible structures*
- *are able to mobilize private funds*

amicus curiae briefs before some international courts such as the European Court of Human Rights (ECtHR) and the IACtHR. (Alina Kaczorowska, *Public International Law* (Routledge, 4th ed., 2010), p.216.

⁴²⁰ *ibid*

⁴²¹ This number may now have significantly increased when it is considered that only eight NGOs (World Vision International, Oxfam International, Save the Children International, Plan International, Médecins Sans Frontières, CARE International, CARITAS International and Action Aid International) had combined revenues of more than \$11.7 billion in 2011. Bill Morton, 'An Overview of International NGOs in Development Cooperation' (2013) <<http://www.cn.undp.org/content/dam/china/docs/Publications/UNDP-CH11%20An%20Overview%20of%20International%20NGOs%20in%20Development%20Cooperation.pdf>>

accessed on 21/06/15

- *have highly motivated staff*
- *possess vast potential for the cause of development*
- *were vital components of the great international conferences of this decade.*⁴²²

The report, after highlighting significant features of NGOs, concluded that the increase of NGOs in number and influence has been prodigious, and that it is therefore time to “bring NGOs and United Nations activities into an increasingly productive relationship of consultation and cooperation”.⁴²³ The confirmation of this report can be seen in the development of the international scene: the number of NGOs has increased at an astonishing rate, that of international non-governmental organizations alone having grown from approximately 1,300 in 1960 to nearly 40,000 today.⁴²⁴ The report thus supports Charnovitz’s argument that NGOs have seen an empowerment period after 1992.

The rise of NGOs⁴²⁵, along with supranational organisations, could perhaps be seen as the most significant political development in the post-war period.⁴²⁶ It has arguably become impractical to ignore their existence by pretending that they cannot be actors under the

⁴²² Report of the Secretary-General ‘An Agenda for Development’ A/48/935 (6 May 1994) <http://www.un.org/ga/search/view_doc.asp?symbol=A/48/935> accessed on 06/11/2013

⁴²³ *ibid*

⁴²⁴ <<http://www.ngo.in/>> accessed on 21/06/2015

⁴²⁵ Examples include Amnesty International (AI), Human Rights Watch (HRW), World Wide Fund for Nature (WWF), Medecins Sans Frontieres (MSF), Friends of Earth (FoE), Greenpeace, the International Olympic Committee (IOC), Catholic Relief Services, Oxford Famine Relief (OXFAM) and the Cooperative for American Relief Everywhere (CARE)

⁴²⁶ Robert Blood, ‘Should NGOs be viewed as ‘Political Corporations’?’ (2005) 9 Journal of Communication Management, pp.120-133, p.120

international law⁴²⁷ in such a time of volatile change in which global civil society significantly impacts on the basic principles of international law.⁴²⁸

Moreover, many NGOs are more effective than many states in terms of resources and international activities. Major NGOs are considerably larger than many states.⁴²⁹ The populations of approximately 40 member states of the UN are under one million,⁴³⁰ while the membership of the major international NGOs, transnational networks and actions groups is numbered in the millions.⁴³¹ Their power and efficiency is greater than the economic and demographic capacity of marginal, micro and miniature states such as Gabon, Eritrea, Laos, Suriname and San Marino. Some major international NGOs have more foreign representatives than many states.⁴³² For instance, the General Secretariat of Amnesty International in London has more staff than the all personnel that work at the headquarters of the Office of the United Nations High Commissioner for Human Rights (OHCHR) in

⁴²⁷ Bosire Maragia, 'Almost There: Another Way of Conceptualizing and Explaining NGOs' Quest for Legitimacy in Global Politics' (2002) 2 Non-State Actors and International Law, pp.301-332, p.317

⁴²⁸ Baslar (2006)

⁴²⁹ Peter Willetts, 'Transnational Actors and International Organizations in Global Politics' in Baylis & others (2011) p. 360

⁴³⁰ The populations of the 95 states of the world are under one million.

⁴³¹ *ibid*

⁴³² World Vision International (nearly 100), Caritas (160+), Transparency International (100+), the International Political Science Association (80+), the International Association of Legal Science (42+), the International Law Association (52), the Institute of International Law (108), the International Bar Association (200+), the International Association of Democratic Lawyers (83+), the International Commission of Jurists (60) and the Inter-Parliamentary Union (176). See: K. G. Saur Verlag, *Legal Status of International NGOs: Overview and Options* (Union of International Associations, 1988)

Geneva.⁴³³ NGOs have in effect already found a place in the international legal order by virtue of their possession of an astonishing number of resources.

Furthermore, some major NGOs have more economic power than states with GNPs of several hundred million dollars,⁴³⁴ having witnessed a tremendous increase in their resource bases over the years.⁴³⁵ To illustrate this, the nearly 500 NGOs in the Interaction network group have a combined annual revenue of over \$2.3 billion⁴³⁶, and Cooperative for American Relief Everywhere (CARE) has an annual budget of over \$446 million to provide assistance to 97 million people in the fields of “hunger, gender, social justice, education, emergencies (conflicts areas such as Syria) and health”.⁴³⁷ Medecins Sans Frontieres (MSF) has a budget of over \$423 million, the United States provided about \$1.3 billion to the West Bank and Gaza through USAID (United States Agency for International Development),⁴³⁸ The Ford Foundation had assets valued at \$13 billion and about \$500 million per year as of the date of January 2000,⁴³⁹ and the International Committee of the Red Cross (ICRC) has 12,000 personnel in more than 80 countries and about 100 million members and volunteers; it spends about €650 million on humanitarian assistance.⁴⁴⁰ From another perspective, the institutions

⁴³³ Amnesty has more than 3 million supporters, members and activists in more than 150 countries and territories in the world, as well as some 410 personnel and 120 volunteers, and receives financial support from about 120 countries. See <http://www.amnesty.org/en/who-we-are> access on 03/03/2015

⁴³⁴ Willetts (2011)

⁴³⁵ Pamela R. Aall, ‘NGOs and Conflict Management: Responses to International Conflict Highlights from the Managing Chaos Conference’ (1996) United States Institute of Peace, p.5

⁴³⁶ *ibid*

⁴³⁷ <http://ar.care.org/#donate> accessed on 04/01/2015

⁴³⁸ http://www.ngo-monitor.org/article/usa_usaid accessed on 26/02/2013

⁴³⁹ <http://www.rkatz.com/webdesign/ngomonitor/archives/infofile.htm#ford> accessed on 26/02/2013

⁴⁴⁰ International Committee of the Red Cross, ‘Discover the ICRC’ (2005) https://docs.google.com/viewer?a=v&q=cache:NdzE88R6qRQJ:www.icrc.org/eng/assets/files/other/icrc_002_

of ICRC, Greenpeace⁴⁴¹ and the World Wildlife Fund (WWF)⁴⁴² are larger than the United Nations Conference on Trade and Development (UNCTAD), the World Trade Organisation (WTO) and the United Nations Industrial Development Organization (UNIDO).⁴⁴³ The WWF has a budget that is approximately two hundred times larger than that of the Commission on Sustainable Development (CSD).⁴⁴⁴ It is clear that NGOs have significant resources that are larger than those of many states.

What is more, Wiessner points out that the value of the activity generated by today's NGOs has grown by more than \$1 trillion dollar a year. In this respect, the sector of civil society has become the world's eighth largest economic power.⁴⁴⁵ It is estimated that the combined resources of all NGOs could total between \$9 and \$10 billion, which is the amount they spend annually on humanitarian assistance.⁴⁴⁶ These funds benefit nearly 250 million

0790.pdf+&hl=en&gl=uk&pid=bl&srcid=ADGEESg6RnNVvH7ikwv5Hz_WvnhSxRYx6vjLGiD98VDfhb3vUbtmkJox7r5EMv_R-

2isLjHoIRoSQxTxkvOYS8Ua0oCTaas0K97lONBOiLiLnCe3jG5UkWC5QUJlzUYC6GuYu8xy-pE&sig=AHIEtbTLVBQU-LjgJ_ixb9GftANmCLduvw> accessed on 26/02/2013

⁴⁴¹ As of January, 2009, Greenpeace has about 2.9 million financial supporters and a presence in 41 countries. See: <<http://www.greenpeace.org/international/en/about/faq/#General>> accessed on 26/02/2013

⁴⁴² WWF has been active in over 100 countries on five continents and while there was 570,000 supporters in 1985, it has currently about 5 million supporters. <http://wwf.panda.org/who_we_are/history/50_years_of_achievements/> accessed on 26/02/2013

⁴⁴³ Alexander Titus, 'In the Name of the People: Strengthening Global Accountability' A One World Trust Discussion Paper, p.6

⁴⁴⁴ Gillian Martin Sorensen, 'The Roles a Civil Society Can Play in International Dispute Resolution' (2002) 18 Negotiation Journal, pp.355-358, p.357 and Baslar (2006), p.22

⁴⁴⁵ Siegfried Wiessner, 'Legitimacy and Accountability of NGOs: A Policy-Oriented Perspective' in Wybo P. Heere (ed.) *From Government to Governance: The Growing Impact of Non-State Actors on the International and European Legal System* (T.M.C. Asser Press, 2003), p.95-101, p.95

⁴⁴⁶ Alex P. Schmid, 'Non-State Actors: Organized Crime, Human Rights NGOs and the United Nations' in Theo C. van Boven, Cees Flinterman, Fred Grünfeld and Rita Hut (eds.), *The Legitimacy of the United Nations: Towards an Enhanced Legal Status of Non-State Actors* (SIM, 1995) pp.125-154, p.128

people.⁴⁴⁷ Taylor states that “international relief and development NGOs are now responsible for delivering more aid than is the UN system”.⁴⁴⁸ NGOs are not only better at acquiring significant resources, they are also good at delivering them to places where they are required. They have thus made the best of distributing sources on the ground.

NGOs have also developed great economic weight within national borders.⁴⁴⁹ For example, they provided more than 12 per cent of the Netherlands’ employment, 8 per cent of that in the United States and 6 per cent in the UK in 1995.⁴⁵⁰ They employed 19 million people in 1998.⁴⁵¹ There are some 154 NGOs whose role is the protection of national resources in the US and who have income or assets in excess of \$5 million.⁴⁵² There is no doubt that NGOs have been increasing in both number and membership.⁴⁵³

The Secretary-General of the UN, speaking at the annual UN/NGO Conference in New York in 1994, highlighted the emergence of many new NGOs on every continent:

In France, for example, 54,000 new associations had been established since 1987. In Italy, 40% of the associations had been set up within the previous 15 years. This phenomenon was also occurring in developing countries. Within a short space of time,

⁴⁴⁷ *ibid*

⁴⁴⁸ Rupert Taylor, ‘Interpreting Global Civil Society’ (2002) 13 *Voluntas: International Journal of Voluntary and Nonprofit Organizations*, pp.339-347, p.340

⁴⁴⁹ Lindblom, *Non-Governmental Organizations*, p.16

⁴⁵⁰ ‘Sins of the Secular Missionaries’ *The Economist* (27 January 2000)
<<http://www.economist.com/node/276931>> accessed on 27/02/2013

⁴⁵¹ *ibid*

⁴⁵² See more: ‘Wealthy NGOs’ <<http://www.sovereignty.net/p/ngo/wealthy.htm>> accessed on 27/02/2013, Baslar (2006), and Lindblom (2005), p.21

⁴⁵³ Keith Suter, *Global Order and Global Disorder: Globalization and the Nation-State* (Praeger, 2003) p.92

*10,000 NGOs had been established in Bangladesh, 21,000 in the Philippines, and 27,000 in Chile. In Eastern Europe since the fall of communism, NGOs had been playing an increasingly important role in people's lives.*⁴⁵⁴

There are about one million in India, upwards of half a million in the UK⁴⁵⁵ and more than 200,000 in Brazil. 40 per cent of NGOs in Italy were set up in last two decades, and the 10,000 in Bangladesh, 21,000 in the Philippines and 27,000 in Chile were all established within a short time.⁴⁵⁶ US NGOs employ more people than the federal government and have a larger combined budget than all world's countries with the exception of the top eight.⁴⁵⁷ NGOs "do things that governments will not, or cannot, do".⁴⁵⁸ Their rapid growth could be considered as pointing to their future impact on the international legal order.⁴⁵⁹

Lastly, while NGOs' voices have been increasing significantly, the United Nations Development Agenda⁴⁶⁰ cannot help but reveal the striking growth in their global impact.⁴⁶¹

⁴⁵⁴ *ibid*

⁴⁵⁵ N. Crowson, Matthew Hilton & James McKay, *NGOs in Contemporary Britain: Non-state Actors in Society and Politics since 1945* (Palgrave Macmillan, 2009), p.2.

⁴⁵⁶ *ibid*

⁴⁵⁷ Suter states that "the United States has 1,243,000 NGOs spread across categories of religion, private education and research, health care, arts and culture, social sciences, advocacy and legal services, international assistance, foundations and corporate funders, and mutual benefit organizations". 80 million American adults and young people also volunteered to work in the \$150 billion worth of projects carried out under the umbrella of NGOs. Suter, pp.92-93

⁴⁵⁸ 'Sins of the Secular Missionaries' *The Economist* (27 January 2000),
<<http://www.economist.com/node/276931>> accessed 27/02/2013

⁴⁵⁹ For more on the increase in the number of NGOs, see Lindblom (2005), pp.19-22

⁴⁶⁰ The Department of Economic and Social Affairs of the UN Secretariat 'The United Nations Development Agenda: Development for All' (New York, 2007)

The report highlights how NGOs participation helped increase the legitimacy of the Fourth World Conference on Women held in Beijing in September 1995. In accordance with the Development Agenda, “it was the largest: an estimated 35,000 NGO representatives participated in the Conference, making it the most highly-attended United Nations Conference on record to date”.⁴⁶² More importantly, the report stated that such participation highlights how the UN is the seat not of governments only, nor does it solely sustain states. In this regard, the report emphasised that “the first phrase of the Charter, ‘We the peoples’, is not empty”.

⁴⁶¹ “[T]he important drafting and lobbying roles that have been played by NGOs in various treaty-drafting contexts; these include the UN Convention against torture, the Framework Convention on Climate Change, the Landmines Convention, and the Statute of the International Criminal Court.” Alston, ‘The ‘Not-a-Cat’ Syndrome’, p.28

⁴⁶² *ibid*

4.2 NGOs in International Law

NGOs have been playing a growing political role in the international realm, and their status with regard to international law has usually been seen as important yet informal.⁴⁶³ This approach is to some extent true. NGOs have been regarded as significant partners. States have thus benefited by establishing relations with NGOs, relations that have mostly been based on informal procedures; the establishment of formal relationships have deliberately been avoided. Significant gaps between the *de facto* and *de jure* status of NGOs are thus evident.

Kaczorowska states that the International Court of Justice (ICJ) has opened the door to non-state actors in *LaGrand (Germany v United States)*.⁴⁶⁴ The court's judgement states that either NGOs or Multinational Corporations (MNCs) can be recognized as subjects of international law.⁴⁶⁵ Gaja states in his report that

*...the Court stated in the LaGrand case that individuals are also subjects of international law. This approach may lead the Court to assert the legal personality even of NGOs.*⁴⁶⁶

This does not necessarily mean that all NGOs have legally become subjects of international law. It means that the possibility is open, and that it depends on NGOs to

⁴⁶³ Lindblom (2005)

⁴⁶⁴ Kaczorowska (2010), pp.184-185

⁴⁶⁵ "*LaGrand (Germany v. United States of America)*, Judgment, I.C.J. Reports 2001, p. 494, para. 77. The Court referred to the Vienna Convention on Consular Relations and concluded "that Article 36, paragraph 1, creates individual rights". Giorgio Gaja, 'First Report on Responsibility of International Organizations' (26 March 2003) DOCUMENT A/CN.4/532; *ibid*

⁴⁶⁶ *ibid* para.17

take advantage. The ICRC has done so, being recognized as a subject of international law.⁴⁶⁷

Moreover, there are also some examples of NGOs having been granted formal places, such as the conferral of consultative status on ECOSOC.⁴⁶⁸ NGOs have sometimes also acquired equal rights with states on particular occasions.⁴⁶⁹ The legal status of NGOs in international law is thus vague, and maintaining that they either do or do not have legal standing is not adequate. This might be because there are no accepted rules on the position of NGOs in international law, so relationships have been determined pragmatically rather than by legislation.

4.2.1 Uncertainty in the Definition of NGOs

As the nature of NGOs does not conform to a set template, which results in a lack of clarity in this respect. There is no generally approved definition of the term “Non-governmental Organization” in international law.⁴⁷⁰ While some definitions exclude political parties, others do not; yet other narrower ones exclude trade unions and churches.

⁴⁶⁷ Kaczorwska, p.216

⁴⁶⁸ Article 71 of the UN Charter

⁴⁶⁹ There is a headquarters agreement which demonstrates the equality between an NGO and a state. The agreement was signed on 19 March 1993 between the ICRC and the Swiss Federal Council to determine the legal status of the Committee in Switzerland. For further details, see International Review of the Red Cross, 30-04-1993 Article, No. 293 <https://www.icrc.org/eng/resources/documents/misc/57jnx7.htm> accessed on 20/11/14

⁴⁷⁰ Lindblom (2005) p.36

According to Lindblom, the reason for this variety of definitions is “a reflection of *ad hoc* approach to NGOs of IGOs and the international legal system in general”.⁴⁷¹ This is true because every international organization exhibits a different approach to NGOs. Inter-governmental organisations (IGOs) have limited the definition of NGOs in terms of what they expect from them. While participation by NGOs is the norm for some organisations, it can be quite radical for others.

The term “NGO” may say little about what one actually is or provide a general understanding of the concept.⁴⁷² The granting of legal status may need further elaboration: a terrorist group could also be an NGO. It might to some extent increase uncertainty about the legal status of NGOs in international law. In fact, each field of law that links to NGOs determines its own definition, as a reflection of the fact that the status and legal framework for NGOs could vary from one area of international law to another.⁴⁷³ Understanding of NGOs is therefore mostly determined by the deliberations of states.

Article 71 of the UN Charter also provides no definition.⁴⁷⁴ A subsequent revision in 1950 does include the following:

Any international organization which is not established by intergovernmental agreement shall be considered as a non-governmental organization for the

⁴⁷¹ Ibid, p.45

⁴⁷² ibid

⁴⁷³ ibid p.36

⁴⁷⁴ “The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence. Such arrangements may be made with international organizations and, where appropriate, with national organizations after consultation with the Member of the United Nations concerned.” Article 71 of UN Charter

*purpose of these arrangements, including organizations which accept members designated by governmental authorities, provided that such membership does not interfere with the free expression of views of the organization.*⁴⁷⁵

This article applies the standards of being “international” and “not established by an international organisation”.⁴⁷⁶

Current provisions on the ECOSOC consultative agreements comprise a broader description:

*Any such organization that is not established by a governmental entity or intergovernmental agreement shall be considered a non-governmental organization for the purpose of these arrangements, including organizations that accept members designated by governmental authorities, provided that such membership does not interfere with the free expression of views of the organization.*⁴⁷⁷

In this provision, the word “such” refers to the criteria for launching consultative interactions with an NGO that are mentioned in this and previous paragraphs of the Resolution.⁴⁷⁸

According to the provision, these criteria are as follows:

⁴⁷⁵ E/RES/1968/1296, ‘1296 (XIV). Arrangements for Consultation with Non-Governmental Organizations’ para.7. <http://www.un-documents.net/1296.htm>. This resolution approved the 288 B (X) Resolution that was taken in February 1950

⁴⁷⁶ *ibid*

⁴⁷⁷ Resolution 1996/31, ‘Consultative Relationship Between the United Nations and Non-Governmental Organizations’, para.12. <http://www.un.org/documents/ecosoc/res/1996/eres1996-31.htm>

⁴⁷⁸ Lindblom (2005) p.38

1. the aims and purposes of the organization shall be in conformity with the spirit, purposes and principles of the UN Charter,⁴⁷⁹
2. the organization shall be of recognized standing within the particular field of its competence or of a representative character,⁴⁸⁰ (i.e. accountability)
3. the organization shall have established headquarters with an executive officer,⁴⁸¹
4. the organization shall have a democratically adopted constitution, and that⁴⁸²
5. the organization shall have a representative structure with appropriate mechanisms of accountability to the members⁴⁸³

The criteria emanating from this resolution are valuable in that they delineate the scope of NGOs. While stipulating that an NGO should be representative and accountable, it also excludes some actors considered as NGOs according to some definitions. These conditions are required for an NGO to acquire consultative status on ECOSOC. It does not, however, follow that an organization not conforming to these standards is not an NGO. In other words, these are not universal rules for what constitutes an NGO. These principles are requirements for NGOs to gain consultative status on ECOSOC. Indeed, this also demonstrates how the definition of an NGO can vary according to circumstances.

⁴⁷⁹ Resolution 1996/31 para.2

⁴⁸⁰ Ibid para.9

⁴⁸¹ Ibid para.10

⁴⁸² ibid

⁴⁸³ Ibid para.12

There are also measures that can be activated when an NGO breaches these criteria. This provision allows for suspending or withdrawing an NGO's consultative status in order to prevent abuse. In this regard, the provision explicitly warns NGOs of suspension and withdrawal in the following cases:

- (a) If an organization, either directly or through its affiliates or representatives acting on its behalf, clearly abuses its status by engaging in a pattern of acts contrary to the purposes and principles of the Charter of the United Nations including unsubstantiated or politically motivated acts against Member States of the United Nations incompatible with those purposes and principles;
- (b) If there exists substantiated evidence of influence from proceeds resulting from internationally recognized criminal activities such as the illicit drugs trade, money-laundering or the illegal arms trade;
- (c) If, within the preceding three years, an organization did not make any positive or effective contribution to the work of the United Nations and, in particular, of the Council or its commissions or other subsidiary organs.⁴⁸⁴

According to subparagraph (a), political parties and liberation movements are not to be granted consultative status.⁴⁸⁵ Excluding such entities may not explicitly be stated in the NGO definition of Paragraph 12. However, the provisions on suspension and withdrawal in conjunction with the definition and the first principle for consultative status (i.e. that the “aims and purposes of the organisation shall be in conformity with the spirit, purposes and principles of the UN Charter”, make it clear that political parties and liberation movements are in fact outside the scope of the definition (“at least that is how the resolution is interpreted).⁴⁸⁶ By the same token, violent and criminal groups can also be excluded⁴⁸⁷ as the

⁴⁸⁴ *ibid* para.57

⁴⁸⁵ Lindblom (2005) p.39

⁴⁸⁶ See the extent of the term “organization” as described in Paragraph 4 of Resolution 1996/31, which reads as follows: “Except where expressly stated otherwise, the term ‘organization’ shall refer to non-governmental organizations at the national, subregional, regional or international levels.”, *ibid*

provision explicitly states that “the aims and purposes of the organization shall be in conformity with the spirit, purposes and principles of the UN Charter”.⁴⁸⁸

Nevertheless, as is observed above, the definition of NGOs can be extended according to circumstances. Just as with political parties, international organizations of national political parties or groupings such as the Liberal International and the Socialist International are also able to obtain consultative status.⁴⁸⁹ Both Socialist International and Liberal International were in fact granted general consultative status with ECOSOC in 1995.⁴⁹⁰ A few liberation movements have achieved observer status with the UN,⁴⁹¹ among them the Palestine Liberation Organization (PLO) in the General Assembly on 22 November 1974⁴⁹² and the South-West Africa People’s Organization (SWAPO) on 20 December 1976.⁴⁹³ Another concrete example of the conferral of observer status on national liberation movements is the resolution that deals directly with this issue in principle.⁴⁹⁴ These examples demonstrate how general rules can be interpreted according to circumstances.

⁴⁸⁷ *ibid*

⁴⁸⁸ Resolution 1996/31 para.2

⁴⁸⁹ Lindblom (2005) p.39

⁴⁹⁰ http://www.un.org/esa/coordination/ngo/pdf/INF_List.pdf

⁴⁹¹ *ibid*

⁴⁹² A/RES/3237 (XXIX) Observer status for the Palestinian Liberation Organization <http://palestineun.org/wp-content/uploads/2013/08/3237-XXIX-Observer-Status-for-the-Palestine-Liberation-Organization.pdf> accessed on 26/11/14

⁴⁹³ A/RES/31/152, <http://www.un.org/documents/ga/res/43/a43r160.htm>

⁴⁹⁴ A/RES/43/160 76th plenary meeting was adopted on 9 December 1988, <http://www.un.org/documents/ga/res/43/a43r160.htm>.

In addition, there are no explicit criteria for non-profitmaking organisations,⁴⁹⁵ while there are clear and explicit principles for the exclusion of political parties. It is surprising that the UN does not refer directly to this significant point. This might be because member states of the UN are more concerned by political organisations than profit-making ones. On the other hand, it could implicitly be concluded from Paragraph 2 that there is a principle involved in non-profit status,⁴⁹⁶ as that paragraph seeks conformity with the purposes and principles of the UN Charter.⁴⁹⁷ Paragraph 13 also considers the articulation of non-profit aims as a principle⁴⁹⁸ and a condition of an organisation's obtaining of consultative status pursuant to Paragraph 13.⁴⁹⁹

Consequently, while there is no limitation in the Resolution's definition of NGO as provided in Paragraph 12, the succeeding or preceding provisions could impose limits. Therefore, ECOSOC's definition can properly be understood by interpreting different provisions in the light of the Resolution.⁵⁰⁰ In this regard, each international organization may construct its own definition of an NGO, while different circumstances may require distinct approaches. Lindblom also emphasizes that "it is apparent that definitions of the term 'non-governmental organisations' vary according to the circumstances. Each institution has its own definition elaborated for its own purposes".⁵⁰¹

⁴⁹⁵ Lindblom (2005) p.39

⁴⁹⁶ *ibid*

⁴⁹⁷ Paragraph 2 of the Resolution 1996/31

⁴⁹⁸ Lindblom (2005), p.39

⁴⁹⁹ *ibid*. See also Paragraph 13 of the Resolution 1996/31: "The basic resources of the organization shall be derived in the main part from contributions of the national affiliates or other components or from individual members..."

⁵⁰⁰ *ibid* p.40

⁵⁰¹ *ibid* p.44

4.2.2 Constructing a Definition of “NGO” for the Security Council

Providing a universal definition of an NGO may be hard because it is vague. It is relatively easy for an entity to determine a definition of NGO for its own purposes. This definition may not work for another body whose purposes are different. And if such a definition under present conditions is nearly impossible, the task is rendered all the more difficult by future NGOs that will come into existence to meet new demands. In any case, a particular definition may not have a significant impact on relations between NGOs and IGOs, meaning that status would be granted to NGOs according to demand. It is not therefore necessary to attach too much importance to the problem of definition. It is their legal status that is the more pressing concern for NGOs. As far as legal personality is concerned, a comprehensive definition of an NGO is possible. By analogy, reference to a “state” does not necessarily mean a democratic one.

There are nevertheless four main sources that can be used to construct a definition of an NGO. These are the General Assembly’s Resolution 1996/31, the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organizations (24 April 1986), the Fundamental Principles on the Status of Non-governmental Organisations in Europe (2003) and the criteria of the Union of International Associations (UIA). Many such institutions have been inspired by these four documents to construct definitions according to their own needs.⁵⁰² The present study will likewise define NGOs with regard to the Security Council. The General Assembly is one of the principal organs of the UN, as is the Security Council, and the two have identical concerns about international

⁵⁰² Baslar (2006), p.25

peace and security issues. It is thus more suitable for this purpose to take the General Assembly's definition as a basis, while not ignoring the other approaches.

NGOs that have already established informal relations with the Council are also considered. These fall into two groups: those that have established such relationships under the umbrella of the NGO Working Group on the Security Council⁵⁰³ and those that have developed interactions individually.⁵⁰⁴ The NGO Working Group on the Security Council comprises approximately 35 NGOs⁵⁰⁵ and some NGOs such as the ICRC⁵⁰⁶, Global Witness⁵⁰⁷ and the NGO Working Group on Women, Peace and Security have done remarkable work by individually influencing the Council.⁵⁰⁸ The reason these NGOs are considered is that it enables a determination as to which type of NGO is more suitable for the Council's purposes. A definition of an NGO that meet the criteria of working with Council can thus be constructed.

⁵⁰³ Since 1997, the NGO Working Group has provided this unique platform for NGOs to access the UN Security Council." <http://www.ngowgsc.org/> accessed on 09/01/2015

⁵⁰⁴ Informal relations between NGOs and SC are evaluated in Chapters V and VI

⁵⁰⁵ <http://www.ngowgsc.org/content/members-ngo-working-group-security-council> accessed 09/01/2015

⁵⁰⁶ Of these, the ICRC has been the most active in interacting with the Security Council and other principle organs of the UN. For example, the ICRC has made several statements to the Council regarding protection of civilians. See <https://www.icrc.org/eng/resources/documents/statement/2014/02-12-civilians-un-security-council.htm> accessed on 11/01/2015

⁵⁰⁷ Global Witness has lobbied the Council to stop the trade in minerals that is fuelling the war in the eastern Congo. <http://new.globalwitness.org/issues.php#countries>. Apart from that the Global Witness has broad number of activities in all around the world. Its sharpest case is 'A Rough Trade'. See more at <http://new.globalwitness.org/issues.php> accessed on 09/01/2015

⁵⁰⁸ This applies to Amnesty International, the Consortium on Gender, Security and Human Rights Femmes Africa Solidarité, Global Justice Center, Human Rights Watch, International Rescue Committee, Open Society Foundations, Refugees International, The Institute for Inclusive Security, Women's Action for New Directions, Women's International, the League for Peace and Freedom and the Women's Refugee Commission. As can be seen, some of them are in the NGO Working Group on the Security Council's NGOs

The common features of these organizations are that they are non-profit⁵⁰⁹, non-violence, have no obvious connections with criminality, are independent of any state, have no political or subversive aims, have democratically adopted statutes and representative structures. These requirements are shared by most definitions contained in international legal instruments, including the aforementioned four major instruments. ECOSOC has also added the requirement of conformity with the principles of the UN Charter.

In short, the definition of an NGO used in this study is that:

- it is international in character, independent of any state and free of governmental influence⁵¹⁰
- its aims are non-profit, non-violence, not obviously connected with criminality, not political or subversive, and conform to the spirit, purposes and principles of the UN Charter
- it has standing within its sphere of interest, and that it is particularly active in the field of humanitarian aid such as security, peace, human rights, poverty, health and education⁵¹¹
- it has a democratically adopted statute, representative structure that is transparent and accountable in its actions

⁵⁰⁹ This does not mean that an NGO cannot make profit, but rather that it may use any profit solely for the aims of the NGO, not to distribute to its members. In other words, its main aim should not be to make a profit.

⁵¹⁰ It is very essential point for NGOs to comply with this requirement in order to be able to take active roles on the Council, as one of its main problems is the lack of resolute and independent actors.

⁵¹¹ As the Council's primary responsibility is to maintain international peace and security, it would be wise to first consider NGOs that have related field works to maintain major contributions.

These criteria in the definition must be met by NGOs applying for formal participation in the Security Council. Various entities that are international in character such as associations, charities, foundations, churches and religious congregations, non-profit corporations and trade unions can be encompassed by this definition. For example Global Witness would suit it perfectly as it does not contravene any requirements of the definition when its aims and activities are considered. International Progress Organization (IPO) likewise has members from over 70 countries, enjoys consultative status with ECOSOC and is associated with the United Nations Department of Public Information. It is strictly non-partisan and is not aligned with any government. It notably aims to promote peaceful co-existence between nations and dialogue between civilizations. It has been calling on the UN, particularly the Security Council, for reform in order to make it more democratic. We can see from its articles that it has expertise in the fields of conflict resolution, civilizational dialogue, international law and United Nations reform. All of these features are well suited to the current definition. Al-Qaida, however, would not be, as its aims are violent, as are those of Colombia's National Liberation Army, and the Yakuza. Of course, further criteria could be applied when considering NGOs for formal status on the Council. Some of these, together with a prospective framework for formal access, are mentioned in Chapter VII.

4.2.3 The Question of Legal Status

The reason the legal status of NGOs in international law has been examined is neither to make a proposal on this topic nor to scrutinize it in detail. In fact, the present thesis advocates formal access for NGOs to the Security Council, since this also means granting legal status. Therefore, understanding the general situation regarding the legal status of NGOs in international law would give an idea as to what extent it is possible and feasible to establish formal relations between the two parties. The main reason for states to approve formal relations with NGOs has been explored. International law provides NGOs with no internationally approved universal legal status. Eventually, this exercise helps to determine the possibility of granting formal access to the Council to NGOs more accurately.

4.2.3.1 The Theoretical Position of the Legal Status of NGOs

As mentioned, there is no clear definition of NGOs; instead, there is a diverse array of definitions. There is likewise a variety of approaches to the legal status of NGOs. In this regard, Lindblom argues that “the theories on international law look very differently on the legal role and position of non-state actors”.⁵¹² Ian Brownlie sees a legal personality in the following terms: “a subject of international law is an entity possessing international rights and obligations and having the capacity (a) to maintain its rights by bringing international claims; and (b) to be responsible for its breaches of obligation by being subjected to such claims”.⁵¹³ In Brownlie’s view, in order to be regarded as a full legal personality, these

⁵¹² Lindblom (2005), p.513.

⁵¹³ James Crawford, *Brownlie’s Principles of Public International Law* (8th ed., OUP, 2012), p.115.

principles must be achieved simultaneously or the legal personality will be constricted.⁵¹⁴ In that case, such an entity's legal personality would depend on agreement, and would be liable to any counter-action.⁵¹⁵

The gap between the de facto and de jure status of NGOs may lead to arbitrary agreement on their legal personality. The substantial involvement by NGOs in international activities demands their acquisition of such a personality, an issue that their significant number of activities would otherwise complicate. As long as the legal status of NGOs has no defined basis, their legal personality is likely to remain restricted.

Two conditions have determined the assessment of NGOs' legal personality:⁵¹⁶ the demands of states might play a leading role in recognising that legal status, and NGOs' performance is important in granting it. It is therefore essential for NGOs to be very diligent in order to achieve legal status. It is within their capacity to influence states to grant them legal rights.

Anne-Marie Slaughter's normative approach⁵¹⁷ to this question entails the observation that if states are not considered as primary actors in the international legal system then the system of

⁵¹⁴ *ibid*

⁵¹⁵ *ibid*

⁵¹⁶ "A theory of NGO involvement can be based on two factors. First, one can look at the needs of governments, or more descriptively, of particular government agencies or officials. Second, one can look at the capability of NGOs." Charnovitz (1997), p.269

⁵¹⁷ Lindblom (2005), p.104

international law founded on that very condition would be irrelevant.⁵¹⁸ She does not clarify exactly who the current actors in the international legal order are,⁵¹⁹ but she does assert that “the challenge of non-state actors is both an empirical and a conceptual one, and that we need to redraw our conceptual maps in ways that help us to solve a number of practical problems”.⁵²⁰ The liberalist strand of international law and international relations theory therefore considers non-state actors to be relevant to law, and suggests a new transnational legal system that would be able to regulate this complex web of relations among private and governmental actors.⁵²¹

However, this liberalist strand does not seem to claim legal status for NGOs under the current international legal order. They focus only on NGOs’ influence while still regarding states as the priory actors.⁵²² Other scholars in the liberal strand of international law such as Richard Falk and Thomas Franck point to the significance role of NGOs and the waning of state dominance. Yet they also fail to make clear proposals as to the status of NGOs under the present international legal system.⁵²³ This might be because their primary aim is to underline the importance of NGOs in the international legal order, as this could constitute a basis upon

⁵¹⁸ Anne-Marie Slaughter, ‘International Law in a World of Liberal States’ 6 (1995) *European Journal of International Law*, pp.503-508. Ibid, pp.103-104

⁵¹⁹ *ibid*

⁵²⁰ American Society of International Law, *Proceedings of the 92nd Annual Meeting : The Challenge of Non-state Actors* (AJIL, 1998), p.36, Lindblom (2005), p.104

⁵²¹ *ibid*

⁵²² “Even as IR has moved to acknowledge the role of non-state actors in international affairs, the discipline still sees states in an elevated position above other actors, as the repository of ultimate power...” Peter J. Spiro, ‘Globalization, International Law, and the Academy’ (2000) 32 *New York University Journal of International Law and Politics*, pp.582-584, *ibid*

⁵²³ Lindblom (2005), p.104

which their legal status can be established. There is a tendency to deal with NGOs in a normative way, and not to make room for them in the present international legal system.

On the other hand, some international lawyers have developed interdisciplinary theories that could also deal with the current status of non-state actors and the fact of personality.⁵²⁴ Michael Byers, for example, considers international legal personality as a qualification that permits an individual or entity to participate directly in customary processes. He argues for the possibility of various levels of legal personality,⁵²⁵ distinguishing the full from the partial level.

For Wessel, however,

[l]egal personality is nothing more (or less) than independent existence within the international legal order. There would not be any use of speaking of an international legal entity when it would not exist under international law. One consequence of this line of reasoning is that there is not much sense in speaking of a 'partial legal personality' of international organizations; neither can we say that a particular international entity possesses legal personality 'to some extent'.⁵²⁶

⁵²⁴ *ibid*

⁵²⁵ “When used in a legal sense, the term personality usually refers to the capacity of an individual or entity to hold rights and be subject to obligations within a particular legal system.” Michael Byers, *Custom, Power and the Power of Rules: International Law and Customary International Relations* (CUP, 1999), p.75

⁵²⁶ Ramses A. Wessel, ‘Revisiting the International Legal Status of the EU’ (2000) 5 *European Foreign Affairs Review*, pp.507–537, p.510

Yet the difference between full and partial legal personalities has been endorsed by the ICJ in its Advisory Opinion on Reparation for Injuries Suffered in the Service of the United Nations, in which it states that “subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights”.⁵²⁷ According to this distinction, states can only have a full legal personality insofar as, in principle, they can possess all international legal rights and are subject to all international legal duties.⁵²⁸ Other subjects of international law are considered as partial subjects with limited rights and duties.⁵²⁹ This category of partial legal personality directly covers international organizations by their constitutional treaties and individuals by the relevant treaties and customary international law.⁵³⁰ Thus, it does not apply directly to NGOs.

Byers asserts that the only actors possessed of full legal personality in the international legal system are states:

*[n]on-governmental organisations do not have international legal personality and are therefore incapable of participating directly in the customary process... States [have] allowed non-governmental organisations to participate, to a limited degree, in certain bodies of some international organisations...*⁵³¹

It might be true that NGOs do not have legal personality, or that they might to whatever extent have limited legal personality, in the international system.

⁵²⁷ Kaczorowska (2010), p.183

⁵²⁸ *ibid*

⁵²⁹ *ibid*

⁵³⁰ *ibid*

⁵³¹ Byers (1996) p.86

However, it would be inadequate to limit the reasons for NGOs not having international legal personality. A comprehensive assessment cannot be made from a narrow perspective on this question. The case for indirect or limited influence on the customary process does not apply only to NGOs. Some states are politically weak, so more powerful ones render them unable to participate in the customary process. The Security Council itself provides an illustration: only five permanent members are able to rule it, because they allow other member states to participate equally in the General Assembly's decision-making process but not the Council's own. As for unrecognized or largely unrecognized states, Byers also argues that influence can vary between states depending on their levels of power. Yet he rejects the legal personality of NGOs while acknowledging their influence. He believes that NGOs can exert pressure on states to grant them indirect access to the customary process, but he thinks this does not mean that those NGOs have a direct role as if they had international legal personality.

Byers considers that participation of NGOs is possible only when States allow them. In fact, some NGOs possess more rights and obligations than most states, and in cases they have been granted access in spite of states' resistance because circumstances have compelled the latter to accept their participation. For example, "when the UN Charter was drafted in 1945, nongovernmental organizations (NGOs) attended the San Francisco conference and lobbied successfully to obtain Article 71, providing for 'consultative arrangements' with the Economic and Social Council (ECOSOC)".⁵³² The participation of NGOs therefore rather depends on their ability to affect circumstances.

⁵³² Willets (2000) p.191

Clark Arend⁵³³ applies international relations theory in a manner similar to Byers,⁵³⁴ but proposes a more acceptable approach to this question of the legal personality of NGOs. He accepts the dominance of states in the current world order and believes that NGOs are able to participate in decision-making processes at states' discretions, maintaining that

*under the present condition of the international system, I believe that non-state actors generally do not participate directly in the law-creating process. Non-state actors, with some exceptions..., do not interact with states in an unmediated manner. Non-state actors may be the origins of a proposed legal rule, but in order for the proposal to become law, it must be accepted by states.*⁵³⁵

He thus agrees that it is possible for non-state actors to propose legal rules, but also that this is subject to the acquiescence of states. However, he also argues that for some exceptions by which NGOs could directly participate. Rather than disregarding NGOs' role, he opines that

*with the growing prominence of non-state actors, it is possible that the international system may be moving toward one in which states would interact with non-state actors directly in the law-creating process.*⁵³⁶

He therefore does not deny the roles of non-state actors, believing that their increasingly important role will lead them to participate directly in the legislative process. He foresees that the international system will eventually consist of both states and non-state actors.

⁵³³ Anthony Clark Arend, *Legal Rules and International Society* (OUP, 1999)

⁵³⁴ Lindblom (2005), p.107.

⁵³⁵ Arend (1999) p.43

⁵³⁶ *ibid*, p.44

In addition, even though treaties, case-law and resolutions regarding inter-governmental organizations have dealt with the international legal status of NGOs,⁵³⁷ different international procedures for NGOs have been implemented: some international organisations have explicitly recognised NGOs, some partially so according to need, and others have even closed their doors to them.

To summarize, just as there are various levels of agreement on the legal personality of NGOs, scholars also adopt a variety of approaches to this question. Of course, the NGOs themselves have been affected by such inconsistent stances. It is difficult for them to manage their activities under conditions of restricted legal personality. Malcolm Shaw considers this issue of legal personality to be a crucial factor, underlining its significance: “without it, institutions and groups cannot operate, for they need to be able to maintain and enforce claims”.⁵³⁸

4.2.3.2 Efforts and Background of Legal Personality of NGOs

This question of the legal personality of NGOs has been debated for decades. Frits Hondius explains that “the quest of NGOs for recognition of their status under international law is almost a century old”.⁵³⁹ The first attempts were made mostly by NGOs themselves rather than by states or international organizations.⁵⁴⁰ The matter can be traced back as far as 1910,

⁵³⁷ Lindblom (2005), p.513

⁵³⁸ Malcolm N. Shaw, *International Law* (7th ed., CUP, 2008), p.195

⁵³⁹ Frits Hondius, ‘Recognition and Protection of NGOs in International Law’ (1999) 2 *The International Journal of Not for Profit Law*, http://www.icnl.org/research/journal/vol2iss2/id_1.htm accessed on 22/12/2014.

⁵⁴⁰ “The most important efforts have taken place at the Union of International Associations and the Institut de Droit International, where scholars have been working on the issue for many decades.” Kerstin Martens, ‘Examining the (Non) Status of NGOs in International Law’ (2003) 10 *Indiana Journal of Global Legal*

when the Institut de Droit International (Institute of International Law) drew up a draft convention on NGOs and, at the suggestion of Nicolas Politis, offered a study on “the juridical conditions of international associations” at its session in Paris.⁵⁴¹ A resolution⁵⁴² was adopted by the Danish Government and put forward in discussion during the Diplomatic Conference on Assistance to Foreigners in 1912 in Paris, which voted unanimously in favour of a draft convention in order to determine the establishment of an international legal status for associations.⁵⁴³ As a final vote on the draft was planned for the next conference, the text of a draft international convention was unanimously accepted by the 23 governments⁵⁴⁴ and 169 international associations.⁵⁴⁵

These deliberations were suspended for the duration of the First World War, but the text encouraged the Belgian government to approve a law on international associations on 25th

Studies, pp.19-20. The 1st World Congress of International Associations convened in 1910 and founded the Union of International Associations. The Congress also proposed that “...[a] *supernational status be established through diplomatic convention, for the use of International Associations without lucrative object, which, by reason of their nature or aim cannot or do not wish to be subject to a fixed society legislation*”. (1, p. 489). See <http://www.uia.org/archive/legal-status-4-1> accessed on 23/12/14

⁵⁴¹ “The discussion continued at the Madrid session in 1911 (4). These early suggestions were then taken up by L von Bar, a member of the Institute, and developed into a short draft convention which was presented to the Institute's session in Christiania in 1912.” <http://www.uia.org/archive/legal-status-4-1>

⁵⁴² This resolution was voted at the fourth Congress organized by the non-governmental Comité International des Congrès d'Assistance Publique et Privée (Copenhagen, 1910) <http://www.uia.org/archive/legal-status-4-3> accessed on 23/12/14

⁵⁴³ *ibid*

⁵⁴⁴ The governments represented were those of Argentina, Belgium, Bolivia, Chile, China, Colombia, Dominican Republic, Ecuador, France, Guatemala, Haiti, Honduras, Hungary, Italy, Luxembourg, Mexico, Norway, Persia, Portugal, Spain, Sweden, Turkey, UK. <<http://www.uia.org/archive/legal-status-4-4>> accessed on 23/12/14. It is indeed encouraging to see the UK, France and China among the signatories, even if they were not permanent members at that time

⁵⁴⁵ *ibid*

October 1919.⁵⁴⁶ This Belgian law was enacted to provide legal status to international non-governmental organizations with scientific objectives such as “philanthropic, religious, scientific, artistic or educational” ones.⁵⁴⁷ According to Article 9,

*the Belgian government shall be authorized to conclude treaties with foreign States for the establishment of an international Statute for international scientific associations on the basis of the present law.*⁵⁴⁸

It can thus be said that “the Belgian model of 1919 is still the most important text in the law of NGOs”.⁵⁴⁹

Nicolas Politis, a member of the Institute of International Law, improved von Bar’s earlier proposals of 1912⁵⁵⁰ and presented them in a report to the Institute. His resulting draft Convention on the Legal Position of International Associations was unanimously approved during the course of the 50th anniversary session of the Institute in Brussels in 1923.⁵⁵¹ The draft laid down the conditions for non-profit international associations, according to which they should have international purposes and memberships and not be motivated by profit.⁵⁵² The treaty also offered an international registrations office⁵⁵³ and, most importantly, the right

⁵⁴⁶ <http://www.uia.org/archive/legal-status-4-4>

⁵⁴⁷ <http://www.uia.org/archive/legal-status-6-1>

⁵⁴⁸ <http://www.uia.org/archive/legal-status-4-4>

⁵⁴⁹ Martens, (2003), p.22

⁵⁵⁰ <http://www.uia.org/legal/app41.php>

⁵⁵¹ <http://www.uia.org/archive/legal-status-4-5> accessed on 24/12/14

⁵⁵² Article 1 states: “...on the basis of its laws to those non profit-making international associations which meet the following conditions”; Article 2: “Are deemed to be international within the context of the present Convention those associations of a private character which are accessible under the conditions laid down by their Articles of Association to subjects and joint bodies of several countries and which pursue, without any profit motive, an objective of international interest”. <http://www.uia.org/archive/legal-status-4-5>

⁵⁵³ This later became the Union of International Associations

to appear before the Permanent Court of International Justice:⁵⁵⁴ Article 7 of the Treaty states that an “...association...may contest the same on the grounds of action ultra vires before the permanent International Court of Justice”.⁵⁵⁵ Even though the Treaty could not be brought into force because no government took advantage of the opportunity to adhere to this convention, it was the first serious and comprehensive attempt to recognise the possession by NGOs of a universal legal personality.⁵⁵⁶

Several attempts also failed during the planning period, mostly for the same reason.⁵⁵⁷ After the end of World War II, some NGOs were granted consultative status in the UN and have attempted to examine the legal status of NGOs. In 1949 they constructed a draft that cut through the red tape involved.⁵⁵⁸ This report made noteworthy points about the legal personality of NGOs, highlighting that the lack of a suitable legal status was affected their work negatively. The additional draft consequently suggested that the legal personality of NGOs should be granted by an international entity independently of national systems.⁵⁵⁹ These efforts have, however, remained paper exercises.⁵⁶⁰

⁵⁵⁴ The current International Court of Justice established in 1945 by the United Nations Charter. The Court started work in 1946 as the successor to the Permanent Court of International Justice

⁵⁵⁵ Article 7; see at <http://www.uia.org/archive/legal-status-4-5> accessed on 24/12/14

⁵⁵⁶ <http://www.uia.org/archive/legal-status-4-5> accessed on 24/12/14 and Holden (2000), p.238.

⁵⁵⁷ Martens, (2003) p.20

⁵⁵⁸ See more at: <http://www.uia.org/archive/legal-status-3-3> accessed on 24/12/14

⁵⁵⁹ “Preliminary draft agreement designed to facilitate the work of non-governmental organizations having consultative or equivalent status with the organs of the United Nations...and Whereas the lack of a firm and assured regime is at present making it difficult for such organizations to operate satisfactorily...”

<http://www.uia.org/archive/legal-status-4-7> accessed on 24/12/14

⁵⁶⁰ Conference of Consultative Non-Governmental Organizations: Granting of International Juridical Personality to Consultative NGOs, <http://www.uia.org/archive/legal-status-4-6> accessed on 24/12/14

Another convention was also proposed by Suzan Bastid in the 44th meeting of the Institute of International Law in 1950 in Bath. However, this proposal attracted no advocates. Another convention on the law of NGOs at the Hague was advanced in 1956, one that applied to foreign companies, associations and foundations. In fact, this convention was approved by the founder members of the European Economic Community (EEC) in 1968. Yet, it never entered into force because of the “complex problems surrounding the recognition of commercial companies”.⁵⁶¹

As Charnovitz concludes, when the general status of NGOs’ legal personality is considered apart from other examples, “leaving aside the Red Cross,⁵⁶² NGOs do not have international legal personality”.⁵⁶³ They have therefore been governed by the laws of the state in which they are incorporated.⁵⁶⁴ This, of course, causes contradictions and creates many difficulties: when an NGO conducts affairs in a different country, it must consider that country’s laws. Significant problems might also emerge. An NGO’s mobility might be reduced because of the plethora of regulatory and jurisdictional systems among the world’s 200 states.⁵⁶⁵

Some progress has, however, been made on a regional level based on reciprocal recognition between countries⁵⁶⁶ within the context of international law.⁵⁶⁷ The European Convention on

⁵⁶¹ Martens, (2003), p.20

⁵⁶² This states that the Red Cross is an organism sui generis in international law. Charnovitz (1997), p.188

⁵⁶³ ibid

⁵⁶⁴ “Under present public international law only states are able to occupy and administer the inhabitable parts of the earth’s surface...” ‘NGOs and the States, <http://www.uia.org/archive/legal-status-3-5> accessed on 26/12/14

⁵⁶⁵ ibid

⁵⁶⁶ Charnovitz (1997), p.188

⁵⁶⁷ Martens, (2003), p.22

the Recognition of the Legal Personality of International Non-Governmental Organizations is the only concrete international agreement on NGOs. It was adopted in 1986 and entered into force in 1990. The convention enables the general recognition of the legal personality of an NGO, allowing its recognition by any state that is party to the convention.⁵⁶⁸

However, the convention has widely been considered a disappointment. The Treaty has only been ratified by 11 countries, and as with the Belgian law, it also recognizes the national law of the states in which respective NGOs have their headquarters. In this respect, the convention does not provide NGOs with an international personality. The essential difference, however, is that “like the snail that carries its shell, every International Non-Governmental Organization (INGO) carries with it its identity and its status⁵⁶⁹ without having to request new recognition from the various countries where it carries on its activities”.⁵⁷⁰ Nevertheless, it does not deal with all problems:⁵⁷¹ it sets “the geographical limits of the Council of Europe and, within them, to the countries who have ratified”.⁵⁷² It simply “takes up the conditions and the constraints of Belgian national law on NGOs”.⁵⁷³ The Convention could thus even be seen as a backward step on the international personality of NGOs.⁵⁷⁴

⁵⁶⁸ European Convention on the Recognition of the Legal Personality of International Non-Governmental Organizations, Article 2(1), 24 April 1986

⁵⁶⁹ Article 2(1) of the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations, which states that “the legal personality and capacity, as acquired by an NGO in the Party in which it has its statutory office, shall be recognised as of right in the other Parties”.

⁵⁷⁰ Marcel Merle, ‘A Legal Tangle: the ‘Status’ of Non-Governmental International Organizations between International Law and National Laws’ (1995) 6 Transnational Associations, p.328.

⁵⁷¹ *ibid*

⁵⁷² *ibid*

⁵⁷³ Martens, (2003), p.23

⁵⁷⁴ *ibid*

In addition, states could also make international commitments concerning NGOs.⁵⁷⁵ For example, the United States has obligation regarding headquarters of the United Nations. The US cannot impede the transit of NGOs' representatives, as the agreement between it and the UN states that

*the federal, state or local authorities of the United States shall not impose any impediments to transit to or from the headquarters district of representatives of nongovernmental organizations recognized by the United Nations for the purpose of consultation under Article 71 of the Charter.*⁵⁷⁶

Another possible scenario is that states sometimes intercede with other states on behalf of NGOs.⁵⁷⁷ A state could, for example, establish diplomatic attempts to another government on behalf of an NGO.

Lastly, because INGOs have not been granted an international legal personality, they have in practice been faced with eight choices when they have been established.⁵⁷⁸ These are: informal (i.e. unwritten) rules, unregistered contracts, registration in accordance with national laws, operation via national members, separation of legal registrations and operational bases, negotiated ad hoc agreements with governments, establishment as trusts or foundations and legal status within canon law.⁵⁷⁹ These different types of establishment can result from the

⁵⁷⁵ Charnovitz (1997), p.188

⁵⁷⁶ Section 11 of the Agreement between the United Nations and the United States Regarding the Headquarters of the United Nations, Signed June 26, 1947, and Approved by the General Assembly October 31, 1947(1)

⁵⁷⁷ Byers (1996) p.189

⁵⁷⁸ See more at: 'Legal Status of International NGOs: Overview and Options' (1996)

<http://www.laetusinpraesens.org/docs/statapp1.php> accessed on 29/12/14

⁵⁷⁹ See more at <http://www.laetusinpraesens.org/docs/statapp1.php> accessed on 29/12/2014

absence of a legal personality. INGOs have thus striven to overcome this gap by establishing different solutions according to their circumstances.

Nonetheless, even though NGOs are regarded as international “outlaws” (referring to their lack of recognition in international law), it is to some extent ironic that a remarkable number of INGOs have an “international tribunal and a legislative function”.⁵⁸⁰ Many also have regulatory function in sports such as football, rugby and the Olympic Games themselves, or other games of significance to national reputations such as chess.⁵⁸¹ Some members might be government-sponsored national representatives, yet clashes of interests are settled in the appropriate organs of the INGO concerned. Likewise, the Court of Arbitration of the International Chamber of Commerce is used as a tool to settle international commercial disputes.⁵⁸² It can therefore be concluded that NGOs’ de facto status has significantly exceeded the limits of their de jure status. As mentioned earlier, the absence of rights is not an insuperable obstacle to NGOs’ participation in and influence on the decision-making processes of international organisations.

In conclusion, firstly, there is no doubt that NGOs are very important actors in the international legal order in terms of their activities and their sources. Their significant capabilities in this respect can be seen as evidence of their significance and their entitlement to formal access to the Security Council: they are truly potent actors on the international scene. NGOs are still in what Charnovitz calls their “empowerment” period that began in 1992. The present period is thus one in which NGOs are able to take responsibility in the

⁵⁸⁰ *ibid*

⁵⁸¹ *ibid*

⁵⁸² *ibid*

international legal order for affecting any international decision-making body, including the Security Council itself.

Secondly, NGOs are able to obtain legal personalities according to circumstances. The level of relationships, whether formal or informal, is determined by the demands of states and the performance of NGOs. Since the latter can play a significant role in granting formal access, it cannot be asserted with any confidence that the Council's member states would definitely reject formal participation of NGOs in the Council. Likewise, as Higgins maintains, social entities should not erect intellectual prisons that prevent circumstances being altered.⁵⁸³

Thirdly, it is difficult for NGOs to operate properly without legal personality. This also shows how important it is to formalize relations between the Security Council and NGOs. Lastly, constructing an appropriate definition of NGOs for the purpose of this study would at least apprise the reader that terrorist groups are excluded.

⁵⁸³ Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (OUP, 1994), p.49.

CHAPTER FIVE

Background of Interactions between the Security Council and NGOs

Most major, effective international organisations have been in dialogue with NGOs,⁵⁸⁴ signing memoranda of agreement or entering into official partnerships relating to the implementation of development projects, relief works, environmental protection or the maintenance of peace.⁵⁸⁵ It might also be a common practice for international organisations to provide counselling or observer status in order to allow them to participate in decision-making processes without the right to vote.⁵⁸⁶ The UN has also developed interactions with NGOs.

⁵⁸⁴ Lindblom (2005), p.366

⁵⁸⁵ One of NGOs' cornerstone activities is the Universal Declaration of Human Rights. In this regard, "some authors even wonder whether the Universal Declaration of Human Rights (1948) would have been adopted if it was not for the pressure and support of NGOs." Nicolas Hachez, 'The Relations Between the United Nations and Civil Society: Past, Present, and Future' (2008) 5 International Organizations Law Review, pp.49-84, p.53.

⁵⁸⁶ Lindblom (2005)

5.1 The Size of the Relationships with the Security Council

Although Article 71 is the only official provision to authorize or encourage relationships between NGOs and the Security Council,⁵⁸⁷ the Security Council has joined the other principle UN organs in establishing and maintaining such relationships.⁵⁸⁸ The Council might have interacted with non-state actors since 1982 via an ad hoc procedure,⁵⁸⁹ but in contrast to other UN organs has mostly refused NGO's demands for access. This might stem from the Council's state-centred focus. NGOs have consequently been prevented from speaking at Council meetings, and from making "consultations to official delegations, government officials of Council members and UN officials" by long-standing practice.⁵⁹⁰ Nevertheless, NGOs have noted that the Security Council has expanded the scope of its functions to deal increasingly with cases beyond traditional inter-state security threats.⁵⁹¹ As mentioned, the protection of human rights and humanitarian assistance can be seen as essential issues for NGOs. Therefore, as Paul states, "as the Council took unprecedented action in the area of sanctions, peacekeeping, election monitoring, policing and post-conflict peace building, NGOs with international policy mandates decided that they must follow the Council's work more closely".⁵⁹²

⁵⁸⁷ Paul (2004) p.373

⁵⁸⁸ Sorensen, p.355

⁵⁸⁹ Therien & Dumontier (n159), p.363

⁵⁹⁰ Alan Boyle & Christine Chinkin, *The Making of International Law* (OUP 2007) p.78

⁵⁹¹ Edward C. Luck, *UN Security Council: Practise and Promise* (Routledge 2006) p. 16 and Binder (2008) p.7

⁵⁹² Paul (2004)

Some conditions have nevertheless paved the way for the establishment of relations between the Security Council and NGOs. Firstly, the Council serves as an implementing body that attempts to execute specific political and social goals.⁵⁹³ The new challenges posed by the changes in international relations have compelled the Council to exercise this function through NGOs. Hume has observed that these changes have influenced the Security Council's functioning.⁵⁹⁴ Council members, particularly the elected members (E-10), have therefore striven to develop relationships with NGOs so as to receive consultative advice when dealing with new difficulties.⁵⁹⁵ The Security Council's decisions have also affected many aspects of life, in which regard it has embarked upon an active and unprecedented program of activities in the fields of "sanctions, peacekeeping, election-monitoring, policing, and post-conflict peace-building" in the 1990s.⁵⁹⁶ NGOs thus pay close attention to Council's work.

The Council aims to take an active role in preventing internal conflicts and global disputes, an aim that could be seen as a basis for relationships between it and NGOs. Such relationships with civil communities increased significantly in the Cold War era in which these types of issues existed.⁵⁹⁷ In this period, 90 per cent of those who suffered from internal conflicts were civilians, so the Council took action to maintain peace and security. The

⁵⁹³ Paul Wapner, 'The UN and Civil Society' in Thomas G. Weiss & Sam Daws (eds.) *The Oxford Handbook on the United Nations* (OUP, 2007), p.257

⁵⁹⁴ Cameron R. Hume, 'The Security Council in the Twenty-First Century' in Malone (2004) p.607

⁵⁹⁵ The Council's new fields of activity include "sanctions, peacekeeping, election-monitoring, policing, and post-conflict peace-building have placed 'a greater burden on SC delegates...". Barbara K. Woodward, 'The Role of International NGOs: An Introduction' (2011) 19 *Willamette J. Int'l L. & Dispute Res.*, pp.203-231, p.222

⁵⁹⁶ *ibid*

⁵⁹⁷ Paul (2004)

Council has also tackled other global threats while dealing with armed conflict. When the members of the Security Council form opinions or make decisions about national disputes or global challenges, they base their intelligence on information provided by NGOs.⁵⁹⁸

The Security Council has found a way of developing relations with NGOs to deal with such issues. Even though “there has been an *ad hoc* procedure since 1982 that permits experts to be convened to provide information to member-states”⁵⁹⁹, a remarkable negotiation process referred to as “the Arria Formula”⁶⁰⁰ was initiated in the second half of the 1990s.⁶⁰¹ An NGO Working Group on the Security Council was established in 1997 after two years of attempts.⁶⁰² It was expected at first that the veto powers would block the process, but it did not function as intended.⁶⁰³ The Council first met with an NGO in accordance with this formula in 1997.⁶⁰⁴ NGOs subsequently began to provide information pursuant to Article 39⁶⁰⁵ about their fields of expertise such as the use of children in armed conflict.

⁵⁹⁸ *ibid*

⁵⁹⁹ Therien & Belanger-Dumontier, (n159) p.363

⁶⁰⁰ This name derives from Venezuela’s UN Ambassador, Diego Arria, who originated this type of meeting.

⁶⁰¹ James Paul, ‘The Arria Formula’ (2003)

<http://www.globalpolicy.org/component/content/article/185/40088.html> accessed 04/03/2013

⁶⁰² NGO Working Group on the Security Council <http://www.globalpolicy.org/ngo-working-group-on-the-security-council.html>

⁶⁰³ James Paul, ‘A Short History of the NGO Working Group’ (2001)

<http://www.globalpolicy.org/images/pdfs/April_2001_-_A_Short_History_of_the_NGO_Working_Group.pdf> accessed on 04/03/2013

⁶⁰⁴ In accordance with Arria Formula that was devised in 1993, a member of the Security Council could unofficially invite non-member states to a room other than the Council’s meeting room. The person who attends these meetings should be an executive manager and not have any relations with governments. ‘UN-Civil Society Relations Panel Established’ (2003) <http://www.globalpolicy.org/component/content/article/177/31845.html>, ‘Arria Formula and Other UN Proceedings’ <http://www.globalpolicy.org/security-council/ngos-and-the-council/arria-formula-and-other-un-proceedings.html> accessed on 05/03/2013

⁶⁰⁵ UN Charter

Amnesty International, Human Rights Watch and OXFAM are also active lobbyists.⁶⁰⁶ A grouping of approximately 100 major NGOs⁶⁰⁷ with different fields of interest meets regularly with delegates. There were about 50 meetings with the UN officials, mostly ambassadors, in 2002.⁶⁰⁸ The NGO Global Policy Forum has held about 40 meetings annually that provide a forum in which NGOs convene with UN ambassadors and senior officials.⁶⁰⁹ These weekly meetings, unrecorded by ambassadors to the Security Council, have involved high levels of NGO participation.⁶¹⁰

No member of the United Nations Secretariat attends these meetings, which are not minuted; NGOs can only explain their outcomes. The NGOs aiming to join the group must demonstrate their seriousness of purpose and their interest in the Council. The Working Group arranges meeting once a year with full delegations. Some 20 NGOs participate in the other meetings held during the year.⁶¹¹

The Security Council has also used the services of NGOs that operate in related fields in order to obtain information for use in internal conflict meetings to resolve domestic conflicts in individual countries. The Council needs accurate and timely information, and hence prizes

⁶⁰⁶ Caroline E. Schwitter Marsiaj, *The Role of International NGOs in the Global Governance of Human Rights: Challenging the Democratic Deficit* (Schulthess Zurich, 2004) p.283

⁶⁰⁷ For a complete list of NGOs that are members of the Working Group, see 'NGO Working Group on the Security Council, List of Associated Organizations'

<http://www.globalpolicy.org/component/content/article/185-general/40398.html> accessed on 05/06/2013

⁶⁰⁸ The increasing level of cooperation is clear from the fact that there were 28 meetings in 1998 and 36 in 2002. Sorensen (n444).

⁶⁰⁹ 'NGO Working Group on the Security Council' <http://www.globalpolicy.org/ngo-working-group-on-the-security-council.html>

⁶¹⁰ Sorensen (n444)

⁶¹¹ Paul, 'The Arria Formula'

such input from NGOs. The Department of Public Information collects information from NGOs and prepares reports for the Council. NGOs are seen as partners, service contractors and policy developers, and play a significant role in facilitating dialogue with the public.⁶¹²

As mentioned earlier, a significant increase in Security Council activities and the extent of its authority following the Cold War is evident. The Council has begun to use “supranational coercion” to deal with issues occurring within borders, such as civil conflicts, humanitarian crises and terrorism.⁶¹³ It is also clear that this development has arisen from a transformation in security threats and from alterations in international norms and in the opportunities presented by the global political system after the Cold War. It is therefore plausible to observe that the members of the Security Council have progressively increased the level of their relationships with NGOs as “partners and service contractors, in emergency and post-emergency” circumstances under the authority of the Council since the Cold War ended.⁶¹⁴ The Council’s intention has always been to increase its capacity to tackle international challenges in the light of new conditions.

⁶¹² ‘NGO Working Group on the Security Council: Introduction’ (2010)

<http://www.globalpolicy.org/component/content/article/185-general/40448-ngo-working-group-on-the-security-council.html> accessed on 05/03/2013

⁶¹³ Binder (2008) p.6

⁶¹⁴ Felicity Hill, ‘NGO Perspectives: NGOs and the Security Council’ in Kerstin Vignard ed., *NGOs as Partners: Assessing the Impact, Recognizing the Potential* (United Nations Institute for Disarmament Research 2002, Geneva) p. 27

5.1.1 The extent to which the Security Council grants access to NGOs

There are two ways of establishing interactions with NGOs: on a legal basis⁶¹⁵ or ad hoc, as circumstances arise. The relations that have developed between the Security Council and NGOs can be said to derive from the latter. By way of illustration, the Council's meetings and consultations increased fourfold just between 1988 and 1993.⁶¹⁶ As the Council has assumed unprecedented responsibilities in the field of sanctions, peacekeeping, election monitoring, policing, and post-conflict building, so have NGOs decided to focus increasingly on the Council's activities.⁶¹⁷ A change in the scope of the Security Council's activities has thus drawn NGOs to seek a way to establish relations with it.

There are reasons other than this expanded scope of activity for enhancing interactions between the Council and NGOs. Firstly, the Council's delegates, particularly the Elected States (E-10), have found it difficult to fulfil these increased responsibilities. This inability has impelled them to seek information, expertise and policy ideas, purposes for which NGOs can be seen as ideal.⁶¹⁸

⁶¹⁵ According to Article 71 of the UN Charter, ECOSOC could arrange official and formal consultations with NGOs

⁶¹⁶ "During this period, the number of Council meetings increased from 55 to 171 and consultations from 62 to 253. The number of resolutions increased from 20 to 93 and presidential statements from 8 to 88" http://www.globalpolicy.org/images/pdfs/Number_of_Security_Council_Formal_Meetings_and_Informal_Consultations.pdf and http://www.globalpolicy.org/images/pdfs/Number_of_Security_Council_Resolutions.pdf accessed on 13 May 2013

⁶¹⁷ Paul, (2004) p.374

⁶¹⁸ Antonio Donini 'The Bureaucracy and the Free Spirits: Stagnation and Innovation in the Relationship Between the UN and NGOs' in Thomas G. Weiss & Leon Gordenker ed. *NGOs, The UN and Global Governance* (Lynne Rienner Publisher 1996) p.83-84, *ibid*

What is more, NGOs play a significant role in moulding public opinion regarding international political behaviours. Their public advocacy and media campaigns have always shaped public understanding of crises. This has furthermore enabled NGOs to use public opinion to leverage governments to take action. The Council has therefore begun to regard the support of such actors as essential to success in its initiatives.⁶¹⁹

The Council's activities have largely moved from international⁶²⁰ to internal conflicts, dealing more with civil wars, the collapse of government authority and internal strife.⁶²¹ This work renders NGOs' expertise and actions essential. For example, when the Council strives to establish peace that is dependent on such factors as economic and social development, respect for human rights and disarmament, these are all fields of NGO expertise.⁶²² That is to say, it has not only been NGOs who have aspired to establish relations with the Council. The Council has also tried to do the same after it has become aware of the demands resulting from its actions.

Apart from the expansion of the Council's functions, criticism of its democratic deficit has also prompted the establishment of relations between the two. These criticisms are stimulated by the Council's anti-democratic structure and its ineffectiveness, both of which result from its permanent members and their veto power. In fact, the Security Council has become more secretive and unaccountable than ever as its meetings have taken place behind closed doors

⁶¹⁹ *ibid*

⁶²⁰ Most of these cases were between states. *ibid*

⁶²¹ Donini (1996)

⁶²² Chadwick Alger, 'The Emerging Roles of NGOs in the UN System: From Article 71 to a People's Millennium Assembly' (2002) 8 *Global Governance* p.117, *ibid*

“in private consultations of the whole” after 1990.⁶²³ Critics and some prominent states have argued that there is a lack of legitimacy in the Council’s work because its practices are not sufficiently transparent or publicly accountable.⁶²⁴ At the same time, some considered the increased relationships between the Council and NGOs as a significant stage for more legitimacy and effectiveness in the international political and legal order.⁶²⁵ It was believed that NGOs could leverage the Security Council and balance it to increase its legitimacy and make it more fit for a legal environment.⁶²⁶ Eventually, this constitutes another circumstance that paves the way for participation of NGOs in the Council.

In short, the increase in the Council’s activities has made the incapacity of the state-based system more obvious. The Council thus feels it necessary to cooperate with NGOs in order to increase its capabilities. Besides, the need to balance the illegitimate behaviour of the permanent members has led the elected members to cooperate with NGOs. In addition to these internal reasons, the Council’s inefficiency combined with the relevance of its activities has led NGOs to aspire to interact with it. There are thus significant reasons driving the development of interactions between the Security Council and NGOs. These reasons could also be instrumental in establishing formal relations between the two.

Nevertheless, even though these circumstances have drawn attention to the importance of NGOs’ involvement, the Council has mostly forestalled the granting of formal access to

⁶²³ *ibid*

⁶²⁴ *ibid*

⁶²⁵ *ibid*

⁶²⁶ See: ‘Reforming the Security Council’ was a conference and organised on May 1994. Some of these views can be found in the speeches. See at: <http://www.globalpolicy.org/security-council/security-council-reform/32789-reforming-the-security-council.html> accessed on 15 May 2013, *ibid*

NGOs. This reaction may at first have come from the permanent Council members, who have strongly resisted NGOs scrutiny of their “special terrain”.⁶²⁷ Some Council members have also been unfavourable to the work of NGOs because of the negative feedback they have received from human rights organisations and other NGOs.⁶²⁸ These factors may therefore have resulted in the restriction of interactions between the two to informal consultations. Especially recently, the results of such meetings have also lost their relevance,⁶²⁹ perhaps because the Council aims to apply to NGOs only when only circumstances render it necessary. The reactions of the Security Council’s members have thus made it impossible to date to take the process beyond informal relations.

⁶²⁷ *ibid*

⁶²⁸ For instance, there were tensions between governments and human rights NGOs in the Vienna World Conference in 1993. Some states had apprehensions regarding the influence of NGOs in terms of reporting “damaging information” to the world’s media. See Thomas G. Weiss & others, *The United Nations and Changing World Politics* (5th ed., Westview Press 2007) p.227

⁶²⁹ While NGOs try to attend such meetings with high level personnel, states do not pay the same amount of heed as do NGOs.

5.2 Precursors of Access

Various types of interactions have developed between NGOs and the Security Council. In this regard, Paul states that four organisations have offered different models for interactions with the Council.⁶³⁰

Firstly, the Quaker United Nations Office (QUNO) represents the worldwide religious organisation of the Society of Friends. This organization might have had the longest relations with the Security Council as an NGO.⁶³¹ The QUNO has arranged informal meetings with delegates and experts to develop peaceful means for conflict and dispute resolution in an informal atmosphere at nearby Quaker House.⁶³² The highly essential work in developing peaceful means that this NGO does for the Council could provide an alternative to military operations. This constitutes proof that formal participation by NGOs could help minimize the use of military intervention, as this is one of the goals of the study.

Another major actor is the ICRC, which aims to promote international humanitarian law and to encourage its implementation in internal law; this venerable organization also provides protection and assistance for the victims of war.⁶³³ The ICRC launched an office in New

⁶³⁰ Paul (2004), p.376

⁶³¹ Its parent body, the Friends World Committee for Consultation (FWCC), has had consultative status on the Economic and Social Council since 1948. See: Quaker United Nations Office <http://www.quno.org/aboutUs/howWeWork.htm> accessed on 20/05/13

⁶³² It has five areas of work which are Peacebuilding, Disarmament & Peace, Human Rights & Refugees, Global Economic Issues and Prevention of Violent Conflict. <http://www.quno.org/areas-of-work.htm> accessed 20/05/13

⁶³³ See: International Committee of Red Cross <http://www.icrc.org/eng/who-we-are/mandate/index.jsp> accessed on 21/05/13

York at the beginning of the 1980s. Importantly, meetings with Security Council delegates are regularly held. This access has been reinforced after it obtained UN observer status in October 1990.⁶³⁴

The ICRC has also met regularly with the Presidents of the Security Council, whose members have tended to be favourable towards the ICRC because of its significant reputation, neutrality, quiet diplomacy and valid sources of information regarding crises.⁶³⁵ However, as Paul states, “though not an NGO, the ICRC was also not a state, so it bridged the two worlds and helped to erode ‘states only’ thinking of Council members”.⁶³⁶ In this regard, the ICRC may be considered as neither an NGO nor a state.

Yet the ICRC has impressed Council delegates thanks to its noteworthy reputation.⁶³⁷ It also has access to the Council through regular meetings that can be quite essential for the granting of access as a major actor from outside the Council. More importantly, the ICRC is not a state and not a member of the Council, yet it is still able to access and influence the Council’s policies. It is also the only NGO that enjoy partial legal personality in international law.⁶³⁸ This is a hopeful sign of the possibly of breaking the veto power’s obstacle to granting NGOs formal access to the Security Council.

⁶³⁴ ‘Observer status for the International Committee of the Red Cross’ UN General Assembly Resolution A/RES/45/6 http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/45/6&Lang=E&Area=RESOLUTION accessed on 21/05/13

⁶³⁵ The ICRC delegates are sent to areas of crisis, and they could gather and use information from the local Red Cross and Red Crescent communities. The ICRC delegates could easily gain access to prisoners, prisoners of war, concentration camps, and hospitals, as well as access to high-level government officials. David P. Forsythe, *Humanitarian Politics: The International Committee of the Red Cross* (Johns Hopkins University Press 1977) and Paul (2004) p. 376

⁶³⁶ Paul (2004)

⁶³⁷ *ibid*

⁶³⁸ Kaczorowska (2010), p.170

Other models have been proposed by the Stanley Foundation and the International Peace Institute (IPI),⁶³⁹ both of whom have been involved in policy research, and both of whom have arranged conferences on the facts concerning major policies.⁶⁴⁰ The Stanley Foundation has complementary relations with the UN: for example, several times a year it has arranged effective private conferences on peace and security in which Security Council ambassadors and high-level UN delegates have participated.⁶⁴¹ The IPI's has gained a solid reputation following its significant experience on peacekeeping activities, and has initiated a number of roundtable meetings on various issues of concern to the Security Council, having assembled high-ranking diplomats, executives, lawyers, academics, and others since 1990.⁶⁴²

It is evident that these NGOs have been active in the fields of peace and security. The QUNO tries to develop peaceful means for the Security Council through informal gatherings of delegates and experts at nearby Quaker House; the ICRC has been active in the implementation of humanitarian laws, and holds regular meetings with the Council; the Stanley Foundation tries to put peace and security issues onto the Council's agenda in conferences; and the IPI has been holding roundtable meetings to influence the Council. In short, informal meetings, private conferences, regular meetings and roundtable meetings are used as a tool to access and influence the Council. These interactions are in fact proof that NGOs can manage to access the Council, on a variety of levels. This is not easy for them, but nor is it impossible.

⁶³⁹ Paul (2004)

⁶⁴⁰ See the Stanley Foundation <http://www.stanleyfoundation.org/programs.cfm?id=3> and the International Peace Institute <http://www.ipinst.org/about.html> accessed on 23/05/2013

⁶⁴¹ <http://www.stanleyfoundation.org/programs.cfm?id=3>, *ibid*

⁶⁴² See IPI 2012 Annual Report http://www.ipinst.org/images/pdfs/IPI_Annual_Report-2012.pdf and Paul (2004), p.376

Consequently, the relationships that have been established between the Security Council and these actors can be seen as a significant – and unprecedented – development. These relations have also influenced the development of interactions between other NGOs and the Council,⁶⁴³ paving their way to access. Some NGOs such as Amnesty International, OXFAM International and MSF initiated relations with the Security Council at the beginning of the 1990s.⁶⁴⁴ They faced the resistance of Council members at first, but still provided a significant number of information networks, a field presence and penetration in conflict regions, and broad public support.⁶⁴⁵ These interactions have potentially planted the seeds of formal relations between the Council and NGOs. At least they have forced reconsideration of any scepticism regarding the possibility of such a development.

⁶⁴³ *ibid*

⁶⁴⁴ Ramesh Thakur 'Human Rights: Amnesty International and the United Nations' (1994) 31 *Journal of Peace Research* p.149, *ibid*

⁶⁴⁵ *ibid*

5.3 Types of Access

As noted above, the limited interactions between the Security Council and NGOs can be described as “informal consultations”. They fall into three categories: the Regular Meeting Process, the Arria Formula and Somavia Meetings, and informal channels (referred to as Bilateral Meetings). In addition to these relations, there are indirect types of interaction: lobbying, international campaigning and implementing agencies.⁶⁴⁶

5.3.1 The Regular Meeting Process

The meetings of the Working Group on the Security Council have taken place regularly outside the Council’s chambers. They consist of informal briefings of individual members of the Council and NGOs. The initial aim of the Funci meeting was to involve all the Security Council members as soon as possible. This step had support from Ambassador Antonio V. M. Monteiro⁶⁴⁷ of Portugal.⁶⁴⁸ The five permanent members of the Council deprecated formal contact with NGOs through these informal consultations, yet they agreed to join this informal process.

⁶⁴⁶ See <http://www.globalpolicy.org/security-council/ngos-and-the-council.html> accessed on 25 May 2013, Binder, (2008) p.12

⁶⁴⁷ He served as president of the Council in April 1997 and June 1998.

⁶⁴⁸ It might be significant to point that the works aim to increase interactions between the Council and NGOs have had considerable support from Council delegates, particularly from presidents of the Council.

The permanent members also asked to present their national perspectives during meetings.⁶⁴⁹ The more important point is that they were expected to obtain support from NGOs for the admissibility and applicability of their own national policies and initiatives. This might indicate that NGOs have increased their reputations and earned sufficient respect of Council members to gain access to the Council. Furthermore, Council delegates have considered these meetings largely as a change of pace from the Council's endless diplomatic discussions.⁶⁵⁰ More importantly, it proves that the permanent five does not pose an insuperable obstacle to granting access to NGOs.

On the other hand, the elected Council members are more natural partners for NGOs. This might be because they do not hold positions of major power or have veto authority, so they strive to achieve most of their aims by working with NGOs.⁶⁵¹ Meetings of the Working Group have eventually occurred almost four times a month. Paul notes that they provide a central and ongoing aspect of the interaction between the main NGOs and the Security Council. NGOs have thereby engaged in a range of other initiatives that extend this process.⁶⁵²

⁶⁴⁹ Thomas G. Weiss & Karen E. Young 'Compromise and Credibility: Security Council Reform?' (2005) 36 Security Dialogue p.135, <<http://www.globalpolicy.org/events/ngo-working-group-on-the-security-council-meetings.html#1997>> accessed on 29/05/13,

⁶⁵⁰ *ibid*

⁶⁵¹ Paul (2004)

⁶⁵² There has been a remarkable expansion in the range of the meetings. For example, the number of meetings with ambassadors increased to 40 by 2002 from just 17 in 1997. See: <http://www.globalpolicy.org/ngo-working-group-on-the-security-council.html> accessed 31/05/2015

5.3.2 The Arria Formula and Somavia Meetings

The Arria formula can be regarded as the most essential step in establishing more interactions between the Security Council and NGOs. There are several reasons for this important status. Firstly, after its momentous inception it has been used as the basis for relations between civil society and the Council.⁶⁵³ Secondly, it is an informal arrangement which provides the Security Council with a broad flexibility to be briefed on issues of international peace and security. The Arria Formula also allows any Council member to invite other members to informal meetings held outside the Council chambers and chaired by the inviting state. The meeting's purpose is for one or more people who are considered as experts on the issue of concern to the Council, and on which its members consider themselves in need of information.⁶⁵⁴

The permanent members of the Security Council have their own sources of information regarding significant global issues, while its elected members remain insufficiently informed. This encouraged the Council President, Venezuelan ambassador Diego Arria, to contact a Croat priest who had just been in the Balkan area of conflict.⁶⁵⁵ It was not possible to arrange a formal Council meeting, so Arria just invited his fellow ambassadors to meet the priest in the delegates' lounge. Some 11 ambassadors attended the meeting, and they were surprised about what they heard from the priest about the conflict. When this meeting raised awareness

⁶⁵³ Weschler also states that, after the first meeting under the Arria Formula, that format was used to brief the Council. NGOs have sometimes informed the Council through this formula

⁶⁵⁴ <http://www.globalpolicy.org/component/content/article/185/40088.html> accessed on 11/06/2013

⁶⁵⁵ This meeting provided Arria with first-hand accounts because the priest was an eyewitness

of the importance of first-hand information, its successors began to be called “Arria Formula” briefings.⁶⁵⁶

There have been further instances of meetings held for the same purpose at that time. Arria understood that the Secretariat was not informing them properly about the case of Somalia. He therefore invited the head of Africa Watch to inform him in the office of the Presidency. Some Security Council members also attempted independently to obtain human rights information as the Rwandan genocide began. Czech ambassador Karel Kovanda sought an expert on Rwanda from Human Rights Watch because he suspected that the Council was not receiving the necessary information about the conflict. He arranged an informal meeting with the NGO expert in his residence in which all the non-permanent members of the Security Council participated in April 1994.⁶⁵⁷ Even though meetings with NGOs are an essential means of obtaining concrete information, Arria pointed out that it is not possible to meet in the Security Council’s rooms. This obstacle was removed by meetings being held informally outside the Council chambers.

After these earliest contacts with the Security Council, representatives of NGOs aspired to meet with the whole Council rather than speaking individually with Council members. Some elected members were of the same mind. One of them, Chilean Ambassador Juan Somavia, assumed that humanitarian NGOs could have a significant influence on the Council’s agenda. To that end he offered to provide a process by which leading NGOs could make presentations

⁶⁵⁶ Joanna Weschler, ‘Human Rights’ in Malone (2004) p.61-62

⁶⁵⁷ *ibid*

in the “Arria Formula Briefing”.⁶⁵⁸ The Council was opposed to the expansion of any involvement by NGOs with its permanent members, but they approved of meetings limited to heads of state and other top officials.

Somavia thus slightly modified the “Arria Formula” by adding delegates who were not from the Council.⁶⁵⁹ Eventually, the “Somavia Meeting” took place on 12 February 1997 to discuss the conflicts in the Great Lakes Region of Africa. Representatives from the ICRC and three humanitarian NGOs (Oxfam, MSF and CARE) attended. During and after that meeting, NGOs heavily criticized the Council’s failure to take action or to find a solution for the crisis. The Council’s permanent members were, needless to say, not pleased with this statement, so they blocked any further Somavia meetings.⁶⁶⁰ Consequently, such meetings might best be seen as a source of inspiration for potential future ones, even though it could not have been repeated at that juncture.⁶⁶¹

This example demonstrates that heavy criticism provokes negative responses, and that it should not be aimed directly at the Permanent Five or indeed at any Council power; instead, it should be general and constructive. It thereby avoids becoming a target and risking the NGOs’ position. This does not necessarily entail deceit or hypocrisy, but it does demand the

⁶⁵⁸ <http://www.globalpolicy.org/component/content/article/185/40099.html> accessed on 11/06/2013

⁶⁵⁹ Juan Somavia ‘The Humanitarian Responsibilities of the United Nations Security Council: Ensuring the Security of the People’ (1997) 7 *Development in Practice* p.353

⁶⁶⁰ The US and France in particular objected to the action. The US denied to the Council that its intelligence satellite photos showed any sign of a refugee emergency, but NGOs reported otherwise in the briefing. *ibid*, Paul (2004) and Binder (2008)

⁶⁶¹ See also Paulo, who states that “...Even if the “Somavia Formula” is dead, the “Somavia Initiative” for NGO-Council dialogue is very much alive.” *ibid*

exercise of care when dealing with issues, and of patience when anticipating developments. This might take some time, so diplomatic language is necessary. The Security Council's mind cannot be changed in a single meeting. NGOs should be careful to use these meetings wisely.

The collapse of the Somavia meeting saw some efforts to return to the Arria formula. Firstly, Antonio V. M. Monteiro of Portugal, President of the Security Council in April 1997, indicated that human rights voices should also be considered. This step was supported by Chile and Sweden among others. Council members eventually surmounted the obstacle posed by the Permanent Five and approved a meeting with Pierre Sane, the Secretary General of Amnesty International. Monteiro made more attempts, striving to take the Arria model further with NGOs, but the permanent members again blocked the process until 2000. The Arria Formula nevertheless re-emerged after interactions with NGOs began to be considered as normal, and indeed advantageous, by Council delegates in early 2000.⁶⁶²

These developments prove that the permanent members do not pose an insuperable obstacle to granting NGOs access to the Council. Their intransigence may make progress difficult for a while, but even though they explicitly oppose access for NGOs, their resistance cannot last indefinitely.

Finally, the Arria meetings can boast a success: the protection of civilians during a time of war. In that respect, Ambassador Peter van Walsum⁶⁶³ of the Netherlands arranged an Arria

⁶⁶² Paul (2004)

⁶⁶³ He was Council President in November 2000.

briefing, “Protection of Civilians in Armed Conflict” through the participation of CARE, Oxfam and MSF. Canadian ambassador Peter Fowler, Council President, aided developments by engineering the meeting and obtaining support from the permanent Council members. Resolution 1296 was consequently adopted after debate in the Council. The outcome of this success showed that the policy interests of like-minded governments are essential to progress NGOs,⁶⁶⁴ who would otherwise struggle to progress relation without Council support.

The Arria Briefings have prompted positive and negative responses from both states and NGOs. Firstly, while no further significant opposition has been expressed to NGOs briefings in principle, several ones proposed by NGOs, such as the cases of Kashmir and the Sudan, were aborted by political opposition.⁶⁶⁵ Secondly, NGOs often regard these meetings as highly important.⁶⁶⁶ For example, Amnesty International attaches particular significance to its work with the Security Council.⁶⁶⁷ They thus expend much effort in time and expense to provide the best representation to the Security Council, including presentations by their top level leaders, chief policy experts and the grassroots voices from conflict regions. The same cannot be said for states. In fact, the briefings’ durations have become shorter, and are attended by few ambassadors and top diplomats. It can be said the Arria process has lost some of its appeal, which has discouraged NGOs and lowered their expectations.⁶⁶⁸

⁶⁶⁴ Paul (2004) p.380

⁶⁶⁵ *ibid*

⁶⁶⁶ Kerstin Martens ‘An Appraisal of Amnesty International's Work at the United Nations: Established Areas of Activities and Shifting Priorities Since the 1990s’ (2004) 26 Human Rights Quarterly p.1060

⁶⁶⁷ *ibid*

⁶⁶⁸ Thomas Conzelmann ‘Informal Governance in International Relations’ in Thomas Christiansen & Christine Neuhold ed., *International Handbook on Informal Governance* (Edward Elgar Publishing 2012) p. 230 and *ibid*

5.3.3 Informal Channels (Bilateral Meetings)

Bilateral meetings take place between individual NGOs and single delegates from the Security Council. The bilateral meetings have significantly developed informal contacts with Security Council representatives, in contrast to the adverse results of the Arria meetings. These can therefore be seen as the foremost aspect of the interactions between NGOs and the Security Council. As mentioned earlier, the Council's delegates need information from alternative channels as the Council has expanded the scope of its activities.⁶⁶⁹ Its non-permanent members in particular have demanded adequate information from outside the Council, as they were not kept sufficiently informed by the Permanent Five, with their advantageous sources of necessary information. They could not rely on the permanent members and they considered media sources to be mostly superficial and unreliable. They found NGOs, on the other hand, very useful and reliable as they came to realize the timeliness and rich detail of their information.⁶⁷⁰

The most important instance of these meetings is the Rwandan genocide in April 1994. The Council's delegates were taken aback by the secrecy of the permanent members and the Secretariat's silence.⁶⁷¹ The callousness of the permanent members could be seen from their speeches. For instance, French President Francois Mitterrand stated that "in such countries, genocide is not too important".⁶⁷² Such responses encouraged the elected members in

⁶⁶⁹ *ibid*

⁶⁷⁰ Steve Charnovitz 'Nongovernmental Organisations and International Law' (2006) 100 AJIL, p.368 and Paul(2004)

⁶⁷¹ Chris McGreal 'France's Shame?' The Guardian (London, 11 January 2007) parag.18
<http://www.guardian.co.uk/world/2007/jan/11/rwanda.insideafrica> accessed on 13/06/2013

⁶⁷² *ibid*

particular to find different means of obtaining information, calling some major NGOs to brief them on the Rwandan situation. For example, New Zealand ambassador Colin Keating⁶⁷³ called MSF and the ICRC to inform him.

The bilateral meetings reflect the impediments posed by the permanent members. It shows that elected Council members in particular are constantly investigating alternative ways to interact with civil society. Their insistence on establishing relations with NGOs reflects their view of NGOs as important actors that can help them overcome the Council's inefficiency. On the other hand, the resistance of the permanent five shows that they regard NGOs as a threat to their authority. One way or another, the reflections of the Council's members, when taken together, prove the significance of NGOs.

⁶⁷³ Council President in April 1994.

5.3.4 Other Means of Interaction

5.3.4.1 Lobbying

The Security Council has been the target of lobbying activities since its establishment. The Quakers and the ICRC, for example, have located their offices near the UN's headquarters and have initiated relationships with the Council from the outset in the field of conflict resolution.⁶⁷⁴ Other organisations have also realised that this is the most influential way to establish relationships with the Council. Paul states that "as NGOs gained experience in Council advocacy, many concluded that the most effective strategy combined diplomacy in New York with world-wide public advocacy campaigns".⁶⁷⁵ Some other organisations such as Amnesty International, Oxfam, Save the Children, Global Witness and Human Rights Watch have used this same method of developing relations with the Council about 45 years after the UN's establishment. NGOs also establish parallel ad hoc coalitions with other NGOs or states with similar concerns.⁶⁷⁶

5.3.4.2 International Campaigns

International campaigns can be considered as one of the most practicable ways of attracting popular attention and support for particular causes. Civil society can leverage states and international organisations to encourage them to implement various policies. Social actors

⁶⁷⁴ Francis Kofi Abiew and Tom Keating, 'NGOs and UN peacekeeping operations: Strange Bedfellows' (1999)

6 International Peacekeeping, p.98-111; *ibid* p.376-377

⁶⁷⁵ Paul (2004) p.383

⁶⁷⁶ *ibid*

“name and shame” to exert pressure.⁶⁷⁷ The cases of blood diamonds and UN resolutions land mines, for example, demonstrate how successful NGOs are in exerting influence on the Council’s policymaking. London-based Global Witness produced “A Rough Trade”, a report on diamonds in Angola⁶⁷⁸ which provided evidence showing how rebel group UNITA⁶⁷⁹ sold diamonds to giant company DeBeers and other Western diamond interest groups. After this report appeared, Global Witness representatives were invited to meet with the Angola Sanctions Committee of the Security Council. As a result of this report, the Committee used innovative methods to tighten its sanctions. UNITA finally collapsed some three years later and the terrible civil war in Angola ended.⁶⁸⁰

5.3.4.3 Implementing Agencies

Another way for NGOs to leverage the Security Council is through implementing agencies.⁶⁸¹ These are also likely to be an essential means for the Security Council to use NGOs to enact its policies, particularly in the field of humanitarian assistance. The significant expansion of the Council’s activities in areas such as peacekeeping operations and post-conflict peace-building has seen it increase its interactions with humanitarian NGOs. While these share significant resources, they are also quite successful in providing technical expertise and

⁶⁷⁷ Richard Price, ‘Reversing the Gun Sights: Transnational Civil Society Targets Land Mines’ (1998) 52 International Organization p.619

⁶⁷⁸ “This document was written to stimulate debate and action on a well-known and much reported issue...” See more at http://www.globalwitness.org/sites/default/files/pdfs/A_Rough_Trade.pdf accessed on 19/06/13

⁶⁷⁹ União Nacional para a Independência Total de Angola (National Union for the Total Independence of Angola), founded in 1966. After losing its army power, it now acts as a political party in Angola

⁶⁸⁰ *ibid*

⁶⁸¹ Margaret E. Keck & Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Cornell Uni. Press 1998) p.79

information.⁶⁸² In addition to providing humanitarian assistance, NGOs were asked to support the Council in the field of collective enforcement.⁶⁸³

On two occasions the Security Council has explicitly called on NGOs to provide information and resources.⁶⁸⁴ Its Resolution 771 of 13th August 1992 concerning the former Yugoslavia “[c]alls upon States and, as appropriate, international humanitarian organizations to collate substantiated information in their possession or submitted to them relating to the violations of humanitarian law, including grave breaches of the Geneva Conventions, being committed in the territory of the former Yugoslavia and to make this information available to the Council”.⁶⁸⁵ In this resolution, the statements “as appropriate, international humanitarian organizations to collate substantiated information” and “to make this information available to the Council” explicitly cover NGOs.⁶⁸⁶ No previous resolution regarding the former Yugoslavia calls for NGOs.⁶⁸⁷

The second example is that of Sierra Leone. In its resolution of 2003, the Council called on states, international organizations and non-governmental organisations to continue supporting the National Recovery Strategy of the Government of Sierra Leone.⁶⁸⁸ The Council made

⁶⁸² Sorensen (n444), p.355

⁶⁸³ Thomas Risse & Others, *The Power of Human Rights : International Norms and Domestic Change* (Cambridge Uni. Press 1999) p.109 and *ibid*

⁶⁸⁴ *ibid*

⁶⁸⁵ United Nations Security Council Resolution 771

[http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/771\(1992\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/771(1992)) accessed on 20/06/13

⁶⁸⁶ *ibid*

⁶⁸⁷ *ibid*

⁶⁸⁸ UN Security Council Resolution 1470 (2003)

[http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1470\(2003\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1470(2003)) accessed on 20/06/13

overt reference to the concept of “non-governmental organisations” rather than implying their existence.⁶⁸⁹ This can be seen as demonstrating that it is possible for the Security Council to alter its approach in 10 years. The fact that the Council has chosen make such an open reference to the concept of NGOs could be a token of a significant increase in NGOs influence and in their legitimacy in international law.

These two examples make it clear the UN’s antipathetic attitude to NGOs has undergone significant changes. At first, the Security Council became aware that relying solely on states was not adequate. Circumstances impelled the Council, including its permanent members, to establish relations with NGOs. Their awareness of their incapacity drove them to call for support and help from NGOs. Even though the Council, and in particular its permanent members, strives to keep its relations with the NGOs informal, the inadequacy of the state-based system may force the Council to consider formal relationships with NGOs. Secondly, the significant increase of NGOs’ reputations in the international legal order encourages the Council to refer to them explicitly. It seems that the formal involvement of NGOs on the Council is not too distant.

⁶⁸⁹ *ibid*

5.4 Concluding Remarks

It can be concluded that it is important for NGOs to establish relations with an institution that had hitherto closed its doors to them. Several methods have been used to grant access to the Security Council, but such relations as have developed have been confined to informal meetings⁶⁹⁰ and have depended on the agreement of Council members, particularly its permanent members. While NGOs have been eager to develop such relationships, the Council has mostly preferred to use a demand-based approach, restricting it to informal consultations. Indeed, relations have sometimes become unilateral rather than remaining bilateral, when the Council's reluctant reactions are taken into consideration. This accords with Willett's prediction that "the last bastions to resist formal relationships with NGOs will be the International Monetary Fund and the Security Council".⁶⁹¹

Nevertheless, the Council's resistance could not withstand the challenging presented by current circumstances, since NGOs have found a place in Council resolutions as supporting actors. The practices of Council members, including its permanent ones, demonstrate that they are aware of their inability to deal with issues of international peace and security solely from a state-based system, but it is still the elected members who aim to develop relations further with NGOs. They persist in attempting to find alternative ways of interacting with NGOs, who have likewise taken an avid interest in obtaining access to the Council. Taken together, the indispensability of the assistance provided by NGOs paves the way for the establishment of concrete formal relations between NGOs and the Security Council.

⁶⁹⁰ Wapner (2007)

⁶⁹¹ Peter Willetts, *Non-Governmental Organizations in World Politics: The Construction of Global Governance* (Routledge 2011) p.62

CHAPTER SIX

Is Informal Access Enough?

Some may argue that informal relations are good enough – indeed, that they are more suitable for the purposes of NGOs. They believe that formal access may compromise the nature of such organizations, claiming that formal access would in fact limit their capabilities, allowing states to control them. On the other hand, some also argues that even the consultative status is not an adequate position for NGOs to perform efficiently.⁶⁹² The outcomes NGOs have achieved by informal relations will first be examined, while determining any problems in this regard. The conclusion will be that formal access has become essential, as NGOs have faced difficulties in demonstrating the efficiency of their performance by informal processes. With some exceptions, states have tended to use NGOs for their own convenience, calling on them as and when they see fit. This state of affairs has already discouraged some NGOs. The present chapter highlights the practical need.

⁶⁹² David Gartner, 'Beyond Consultation: Civil Society and the Governance of International Institutions' (2010) Center for Universal Education at Brookings Working Paper 3

6.1 Outcomes of informal interactions between the Security Council and NGOs

A person's employability depends to a large degree on their previous experience and achievements, which are key indicators of reliability because past deeds strongly suggest future ones. The same applies to NGOs in the present context: it is necessary to address their experiences and achievements under conditions of informal relations in order to support a case for formal access.

NGOs have to some extent been successful in empowering themselves to influence decisions taken by decision-making organs. There are many examples of NGOs' achievements in this area. Kofi Annan aptly states that their involvement has increased over the last few years and has "moved 'upstream' as NGOs participate more and more commonly in the design of projects".⁶⁹³

As mentioned earlier, the Security Council has maintained informal relationships with NGOs since 1982⁶⁹⁴, relationships that were reinforced by the Arria⁶⁹⁵ formula in 1992. An NGO Working Group also advocates off-the record relationships with the Council by arranging briefings for delegates. It brings together 30 high-profile NGOs including OXFAM, MSF,

⁶⁹³ Kofi Annan, 'Arrangements and Practices for the Interaction of Non-governmental Organizations in All Activities of the United Nations System' Report of Secretary-General, A/53/170, 10 July 1998, para. 46

⁶⁹⁴ Ad hoc procedural relations

⁶⁹⁵ "The members of the Security Council are encouraged to plan "Arria-formula" meetings, in accordance with paragraph 54 of the Note by the President of the Security Council (S/2006/507), and to take part in such meetings." <<http://www.un.org/en/sc/about/methods/arriaformula.shtml>> accessed on 09/09/14

Amnesty International, and CARE under the leadership of the Global Policy Forum.⁶⁹⁶ Under these informal interactions, NGOs have striven to increase Council member states' awareness of issues related to human rights, humanitarian aid, disarmament, and the environment.⁶⁹⁷ In addition to informal relations, some interactions have also been established under a subsidiary organ for specific cases at formal meetings under Article 29.⁶⁹⁸ These interactions have produced specific outcomes. To this extent, NGOs have been able to introduce issues onto the Security Council's agenda and to orient the decision-making process.⁶⁹⁹

There is no doubting NGOs' capacity for advocacy and influence. James Paul maintains that "this was NGO advocacy at its best and most effective".⁷⁰⁰ Global Witness is a major NGO. It describes itself thus: "we find the facts, we uncover the story and we change the system".⁷⁰¹ One of its most noteworthy ventures provides a very powerful illustration of this definition. Global Witness has succeeded in drawing the international community's attention to the problem of conflict diamonds (known also as "blood diamonds") by releasing their report "A Rough Trade" in 1998.⁷⁰² This report demonstrates how diamonds helped fund the civil war in Angola.⁷⁰³ The Security Council has consequently adopted Resolution 1295 in April 2000.⁷⁰⁴ In fact, some resolutions such as 864 (1993), 1127 (1997), 1173 (1998) and 1237

⁶⁹⁶ Ibid, Therien & Belanger-Dumontier, (n159), pp.355–377 and 365-366

⁶⁹⁷ ibid

⁶⁹⁸ Article 29 of the UN Charter

⁶⁹⁹ ibid

⁷⁰⁰ Paul (2004) p.382

⁷⁰¹ Global Witness <<http://new.globalwitness.org/aboutus.php>> accessed on 08/09/14

⁷⁰² <<http://www.globalwitness.org/campaigns/conflict/conflict-diamonds>> accessed on 08/09/14

⁷⁰³ ibid

⁷⁰⁴ Global Policy Forum <<https://www.globalpolicy.org/component/content/article/202/41592.html>>accessed on 08/09/14

(1999) had already been taken on Angola. Yet Global Witness had discovered violations of these resolutions.

The Council might not have known the facts, or it might have pretended not to know. Nevertheless, an NGO was able to uncover the facts and change the situation. This incident therefore actually constitutes evidence for NGOs' power and the inability or outright failure of the Security Council. In this respect, James Paul states that "Global Witness showed how a compelling and original analysis could mobilize public support, affect government positions and change thinking and action in the Council".⁷⁰⁵

However, the first Security Council resolution on Angola was in 1993. The Global Witness report was published in 1998, while the Council resolution relating to that report was taken in 2000. This seven year gap strongly suggests that the Council was too late in the light of the resolutions themselves, all of which – from 785 in 1992 to 1173 in 1998 – focused on UNITA.⁷⁰⁶ The Council resolution on Angola consisted mainly of reaffirmations of condemnations and sanctions against UNITA. Yet the UNSC barely recognised that UNITA was not the only problem in Angola. It took an NGO to prove that that other actors were also at play in the Angolan conflict, their report revealing the countries that were violating sanctions against UNITA for their own interests.

⁷⁰⁵ Paul, (2004), p.381

⁷⁰⁶ The National Union for the Total Independence of Angola (UNITA) is a political party in Angola

If formal access had been granted, Global Witness or another NGO would have discovered the facts more efficiently and exerted pressure on the Security Council to act in time, thereby forestalling further violations of human rights. This is not to ignore the fact that Global Witness had succeeded through informal channels. Yet neither can the unconscionable lateness of the report as the result of the lengthy procedures entailed in those informal interactions be gainsaid. It cannot be denied that, had the report been issued at least a year earlier, it would have been able to prevent many of those violations of human rights and to save the lives of many people over that period.

Moreover, NGOs have played a significant role in the strengthening the Angolan sanctions regime. After civil actors had increased the awareness of Council members, some resolutions were also adopted to prevent the illicit flow of arms into Africa and to protect civilians, particularly women.⁷⁰⁷ NGOs have made contributions to the establishment of *ad hoc* international criminal tribunals for Yugoslavia and Rwanda.⁷⁰⁸ Council members were apparently not aware of the exact situation in Yugoslavia until a Bosnian priest came to New York and asked to see various Council members,⁷⁰⁹ but only Ambassador Arria agreed to meet him.⁷¹⁰ If no one including the Ambassador had done so, the priest would have been forced to return to Bosnia having made no impact. It cannot be right to leave issues of

⁷⁰⁷ <<http://www.un.org/en/sc/about/methods/arriaformula.shtml>> accessed 09/09/2014

⁷⁰⁸ Binder (2008), p.16. NGOs have also had significant contribution in establishment of the International Criminal Court in a variety of ways such as 'International agenda setting, facilitating the ratification process and bringing organisational expertise, on-going development and support of the Court.' See more: Kristie Barrow, 'The Role of NGOs in the Establishment of the International Criminal Court' (2004) 2 Dialogue, pp.11-22, p.16.

⁷⁰⁹ Paul, 'The Arria Formula'

⁷¹⁰ *ibid*

international peace and security to such informal arrangements with their uncertain access and equally uncertain impact.

Another prominent example is Security Council Resolution 1325, adopted on October 2000. This was the first formal acknowledgement from the Council that respect for women's rights and support for women's participation in peace negotiations and in post-conflict reconstruction was required.⁷¹¹ This resolution was adopted after lobbying by dozens of women's organizations.⁷¹² Its date illustrates how hard it is to adjust to the realities of the world order without NGOs. The pressing issue of women's rights is hardly a new one, but the Council has remained silent on it until the dawn of the new millennium. If NGOs had not influenced the Council, then it would not have adopted any resolution on such a significant issue even until the present time. This proves that the Security Council alone is not able to consider all issues.⁷¹³ The state-based Council system has deficiency to keep pace with global evolution.

⁷¹¹ The United Nations Security Council Resolution 1325

<[http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1325\(2000\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1325(2000))>

⁷¹² United States Institute of Peace, 'What is U.N. Security Council Resolution 1325 and Why is it so Critical Today?'

<http://www.usip.org/gender_peacebuilding/about_UNSCR_1325#Why_is_Resolution_1325_important_>

⁷¹³ As the Syrian conflict continues, the issue of protecting Syrian antiquities appears not to be considered. There is, however, an NGO that does. In this regard, the report of the American Association for the Advancement of Science (AAAS) has spurred the Council to action. The Council adopted Resolution 2199 on 12 February 2015, according to which "all Member States shall take appropriate steps to prevent the trade in Iraqi and Syrian cultural property and other items of archaeological, historical, cultural, rare scientific..." See more at <https://www.globalpolicy.org/component/content/article/144-bibliographies/52741-un-security-council-banning-all-trade-with-syrian-antiquities.html> accessed on 04/04/15

Apart from the efforts of NGOs on their own initiative, the Security Council has also explicitly asked them for support. For example, Resolution 771 in 1992 regarding Yugoslavia “...demands that relevant international humanitarian organizations, and in particular the International Committee of the Red Cross, be granted immediate, unimpeded and continued access to camps...within territory of the former Yugoslavia and calls upon all parties to do all in their power to facilitate such access” while the following paragraph calls “upon states and, as appropriate, international humanitarian organizations to collate substantiated information...” regarding breaches of human rights.⁷¹⁴ The Council refers more explicitly to NGOs in Resolution 1470 of 2003: it “[c]alls on States, international organizations and non-governmental organizations to continue to support the National Recovery Strategy of the Government of Sierra Leone”.⁷¹⁵

Not the least significant example is the Ottawa Treaty (also known as Anti-Personnel Mine Ban Convention, often referred to as the Mine Ban Treaty but officially named the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction) was signed after lengthy efforts by NGOs in December 1997.⁷¹⁶ Although this treaty does not refer directly to interactions between the Security Council and NGOs, yet it provide indirect acknowledgement of their influence. The Convention was signed by 162 states but not by 35, including the US, Russia and China. The

⁷¹⁴ UN Security Council Resolution 771 (13 August 1992), para.4-5

⁷¹⁵ UN Security Council Resolution 1470 (28 March 2003), para.8

⁷¹⁶ “In the efforts to ban anti-personnel mines, two NGOs are of primary significance: the International Committee of the Red Cross (ICRC) and the International Campaign to Ban Landmines (ICBL).” Nicola Short, ‘The Role of NGOs in the Ottawa Process to Ban Landmines’ (1999) 4 *Kluwer International Law*, pp.481-500, p.483

Treaty thus demonstrates how NGOs could persuade two thirds of UN member states to adopt a measure against the opposition of three permanent members of the Security Council.

In addition, given the fact that the Ottawa Treaty was formulated as it were “from below”, many international legal scholars, activists, diplomats and organizations believe that the Convention represents both a democratization and a new source of legitimacy for international law.⁷¹⁷ The Ottawa Treaty can therefore be seen as a hallmark achievement of NGOs.

Nevertheless, the above examples are still not enough to allow informal relations to be considered adequate. For example, the Ottawa Treaty has only been ratified by 40 states. Three permanent members of the Security Council do not adhere to it. As mentioned, the resolution on women’s rights could have been taken much earlier if NGOs had had formal access to the Council. The ICC could also have been established earlier, and could even have prevented many war crimes. A stronger ICC striving to implement rules of international law might have been in evidence.⁷¹⁸ Such a Court would be able to restrain the Council’s questionable actions. Informal access to the Council can thus result in only limited or late success, while formal access would make NGOs’ performance more efficient.

⁷¹⁷ Kenneth Anderson, ‘The Ottawa Convention Banning Landmines, the Role of International Non-governmental Organizations and the Idea of International Civil Society’ (2000) 11 EJIL , pp.91-120, p.91

⁷¹⁸ Although the recognition of a Palestinian state is controversial because of US resistance, the ICC still does not hesitate to approve Palestine as a party to the Roma Statute. In this regard, “the International Criminal Court (ICC) held a ceremony on 1 April 2015 at the seat of the Court in The Hague (the Netherlands) to welcome the State of Palestine as the 123rd State Party to the Rome Statute, the ICC's founding treaty”. See http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1103.aspx accessed on 01/04/2015

Their achievements certainly cannot be denied. James Paul⁷¹⁹ classifies their contribution to the Security Council. First, they have improved its accountability and transparency. He states that “after more than a decade of NGO action, the public knows much more about the Council than before, and citizens are in a stronger position to demand accountability for Council action”.⁷²⁰ Secondly, NGOs have provided better information and analysis to Council members. In fact, its non-permanent members have increasingly benefited from this, because NGOs have broken the permanent members’ intelligence monopoly. The Council has been much “better informed, on a wider range of issues, than at the start of the 1990s and before”.⁷²¹

It is true that NGOs have a significant capacity to provide information. It may be wondered if the state, with its intelligent service, is not better placed in this regard. Jaeger considers that “if they (UN officials) were unable to obtain the relevant information from independent sources (and UN backup facilities are often unable to produce an in-depth analysis), committee members would have to take government reports at their face value and would be hard pressed to challenge them”.⁷²² NGOs allow comparison to be made between information that various sources because they can provide independent and comprehensive sources of

⁷¹⁹ Paul (2004) p.384-386

⁷²⁰ “The Council thus moved steadily away from the secrecy of the early and mid 1990s, when it did not even allow the Secretariat to tape record the Council President’s press statements. NGO information culture, magnified by the web, had seeped into the Council, changing its outlook and working methods.” *ibid*, p.383

⁷²¹ *ibid*

⁷²² Gilbert Jaeger, ‘Participation of Non-Governmental Organizations in the Activities of the United Nations High Commissioner for Refugees’ in Peter Willets (ed.) *Pressure Groups in Global System: The Transnational Relations of Issue-Oriented Non-Governmental Organizations* (Continuum International Publishing, 1982)

information. It is therefore easier more accurately to analyse causes without obscuring facts⁷²³ rather than relying on possibly biased inferences.

Thirdly, NGOs have taken the lead regarding some procedural reforms, launching their own regular consultation processes with Council members and expanding the Arria Formula. They have adopted the aim that there should be more informative mission web sites and have significantly broadened the nature and amount of UN information on the Council and its work.⁷²⁴ They have also pushed the Council to adopt new approaches in its field missions, and have promoted expert panels to reinforce sanctions.⁷²⁵

One of the main reasons for the maintenance of informal interactions is that NGOs cannot legally participate in the Council, thus concentrating its legislative activity in the informal arena.⁷²⁶ In this regard, NGOs find informal relations to be an alternative way of establishing relations with international law-making. It can be concluded that NGOs would actually prefer to establish formal relations, regarding informal ones as their least preferred option. For example, if they favoured the latter, they would not strive consultative status in ECOSOC, nor would they complain about the deficiencies inherent in informal relations. A second reason is that informal relationships are demanded by the Council, which regards informal relations as an option for receiving information from NGOs. Yet informal relations are not

⁷²³ For instance, as regards the aforementioned Syrian conflict, NGOs successfully provided footage on the use of chemical weapons. In fact, this issue was not even on the agenda of states until NGOs revealed the footage

⁷²⁴ *ibid*

⁷²⁵ *ibid*

⁷²⁶ Pauwelyn & others (2014), p.742

enough, either for the Council's needs or for international legal circumstances. It would thus be advisable for the Council to allow formal access to NGOs.

In conclusion, NGOs have achieved a remarkable amount, both in the Council and outside it. It is clear that they have influenced the Council's decision-making process and have accomplished much in the legal and political policy arenas.⁷²⁷ It is thus helpful to note their capacity to influence states, and consequently to push the latter to take action. At the same time, it also demonstrates how limited access has mostly resulted in limited successes that have been gained only through the limited access and sources entailed in informal relations. In fact, it is not easy to exert pressure on the Security Council, "the ultimate bastion of power politics", by participating NGOs.⁷²⁸ Nonetheless, as Therien and Dumontier state, NGOs have contrived to loosen "the grip that states have on the institution" despite these impediments.⁷²⁹ In adverse circumstances they have managed to increase their strength in world politics⁷³⁰ and have achieved many outcomes through informal interactions. It can thus plausibly be maintained that such achievements would be rendered even more satisfactory by the establishment of formal relationships.

The cases just discussed relate to issues of security and peace. They demonstrate that NGOs have already helped maintain international peace and security, nominally not their legal responsibility but that of the Security Council. This provides grounds for asserting that if

⁷²⁷ James Paul has summarized previous legal and political achievements. See in Paul (2004)

⁷²⁸ Therien & Belanger-Dumontier, (n159) p.366

⁷²⁹ *ibid*

⁷³⁰ *ibid*

formal access (which implies legal personality) were granted, they would greatly increase their success in that role.

6.2 Why Formal Access is Necessary, Rather than Maintaining Informal Access

*“...The time has arrived to bring NGO and United Nations activities into an increasingly productive relationship of consultation and cooperation.”*⁷³¹

*“Security Council members should further strengthen their dialogue with civil society...”*⁷³²

Different approaches to the manner in which NGOs participate in the Council’s activities are evident, be these formal or informal. Some of those social actors most involved agree with member states that they are content with the present informal relationships with the Council, believing that such interactions have assisted that body and therefore disagreeing with calls for formal consultative status.⁷³³ Their contemporaries are unhappy with this state of affairs, considering that informal consultations are skewed excessively in favour of northern and mostly New York-based NGOs while tending to exclude southern ones.⁷³⁴ Some also argue that there are many reasons to strengthen the legitimacy of NGOs in the Council, as informal interactions are insufficient and unproductive.⁷³⁵

⁷³¹ Boutros Boutros-Ghali, ‘An Agenda for Democratization’ (1996) United Nations, para.147

⁷³² Report of the Panel of Eminent Persons on United Nations–Civil Society Relations, ‘We the Peoples: Civil Society, The United Nations And Global Governance’ (11 June 2004) UN Document A/58/817, p.18

⁷³³ *ibid.*, p.45

⁷³⁴ *ibid.* This point is argued in Chapter VI

⁷³⁵ In that respect, Maragia declares that “[r]ecognition of NGOs in international instruments, their participation in global agenda setting, promulgation and enforcement of global norms, and co-optation by states into areas such as international development are all evidence of NGOs growing acceptance and emerging legitimacy in global politics consistent with customary international law. Given this growing salience and near indispensability of NGOs in world governance, it would be counterintuitive to deny them international legal personality or legitimacy in the system”. Maragia (2002), p.332

Some may argue that decisions that cannot be taken in formal meetings can be achieved in informal ways. It is held impossible to overstep formal boundaries in formal meetings, yet it is possible to ignore formal procedures – or, for that matter, to introduce rules into informal ones.⁷³⁶ Paul Wapner asserts that NGOs can influence delegates and personnel of UN member states from the outside by informal contacts in the halls of convention centres, hotel rooms and on the street. Firstly, he suggests that NGOs play an especially useful role in educating UN personnel, state representatives and the general public about emerging crises or other concerns of wide transnational import.⁷³⁷ In this context, they could press states and the UN to address such dilemmas by media campaigns, lobbying, social mobilization or protest.⁷³⁸ NGOs can also hold meetings at large UN conferences in an attempt to influence UN deliberations and policies.⁷³⁹

Wapner advocates another way to influence member states: organising side events at UN conferences.⁷⁴⁰ In this way NGOs can work with particular governments and international organisations to present information about salient facts regarding ongoing negotiations. Such meetings have mostly been held in nearby hotels and other venues, and they have often

⁷³⁶ “The distribution of formal power determines the organization’s policy outputs in ordinary times. Informal power consists of the ability to obtain desirable outcomes within an organization, at some cost, by going outside of normal channels.” Randall W. Stone, ‘Informal Governance in International Organizations: Introduction to the Special Issue’ (2013) 8 *Review of International Organizations*, pp.121-136, p.125

⁷³⁷ Wapner (2007) p.258

⁷³⁸ For example, “the scientists, representing 230 environmental groups, want the U.N. General Assembly to use authority under the Law of the Sea Treaty to adopt a resolution halting long-line fishing for up to 10 years, allowing sea turtles to recover from the brink of extinction”. The activists concerned wrote letters and organized meetings with UN personnel and state representatives, aimed at inducing the General Assembly to apply its authority. *ibid* and ‘Findings’, *The Washington Post* (7 June 2005)

⁷³⁹ Such events provided opportunities for civic groups to “network, share information, celebrate their participation in global governance, and coordinate political strategies”. Wapner (2007) p.259

⁷⁴⁰ *ibid*

received support from the UN Secretariat in the form of managing organisations and providing logistical assistance.⁷⁴¹ All of these all methods could to some extent influence member states, and even result in success on occasion.

Although it might very well be possible for NGOs at least partly to obtain their goals through these outside activities, there are two reasons why it would be quite a risky process for security and peace: the length of the process, and low probability of positive outcomes. Regarding the first, it requires a convoluted process for NGOs informally to press states to take decisions regarding their concerns. They would first have to expend significant efforts to gain informal access, then be able to provide resources. If formal access were already in place, then providing resources would be the only step involved. Urgent of security and peace issues will not wait for lengthy procedures. The Panel Report advises interested parties “to strengthen the capacities of civil society and communities to carry out early warning and response”.⁷⁴² Otherwise, the current problem of inertia in the Security Council would not be solved.

Activities intended to influence states are likely to be less effective through informal than formal channels. Wapner believes that NGOs could be intimately involved through formal mechanisms in persuading member states. He points out the inefficiency of their informal counterparts, which reduces the number of direct encounters between NGOs on the one hand and state delegates and UN personnel on the other.⁷⁴³ Likewise, Woodward rightly indicates that when NGOs can formally participate in decision-making processes, their influence on the

⁷⁴¹ *ibid*

⁷⁴² United Nations A/70/95-S/2015/446, para.77

⁷⁴³ *ibid*

formation of international law is more effective.⁷⁴⁴ When there is no formal pressure, such outcomes depend totally on the wishes and the consent of states.

Moreover, discussion of security and peace issues concerns the seriousness of those problems, given that the maintenance of international peace and security is both highly important and urgent – a resolution should not wait indefinitely. Security and peace issues must be dealt at once in order to forestall further crises. Attempts to influence UN member states from outside involve open-ended, long procedures with no guarantee of success. This does not mean that such attempts should not be made, but they are neither satisfactory nor efficient. Willetts makes three points about the benefits of formal access:

*First, NGOs have access to all UN documents, once these have been officially circulated...Along with being able to attend the meetings and observe the proceedings, this means that the NGOs can gain high levels of information, about the political process. ...Secondly, NGOs have security passes giving them access to all the buildings... They therefore have access to the delegates. ...Thirdly, being awarded consultative status gives the NGOs a legitimate place within the political system. This means that the NGO activist is seen as having a right to be involved in the process.*⁷⁴⁵

⁷⁴⁴ Woodward (n595), p.214

⁷⁴⁵ Peter Willetts, 'Consultative Status for NGOs at the United Nations' in Peter Willetts (ed.) *The Conscience of the World: Influence of NGOs on the UN System* (C. Hurst & Co. Publishers, 1996), p.43

In short, NGOs would be very happy to gain immediate access to officials and documents and to talk without impediment to delegates.⁷⁴⁶ Such access would significantly contribute to the maintenance of peace and security. On the other hand, these conferences take place at the behest of NGOs and states regarding issues that are not urgent. Yet holding meetings to discuss the maintenance of peace and security must be their obligation rather than just their wish. The ways that Wapner propounds could prove efficacious for circumstances that are not serious or urgent, but not for issues that threaten regional or international stability.

Of course, it cannot be denied that it would be very hard to establish relations between NGOs and the Security Council by hoping for a positive formal reaction from the permanent members. However, the fact that the only chance to influence events is informal cannot logically lead to the claim that such interactions are a more efficient way of swaying the decision-making powers. If there were a formal place for NGOs on the Council, NGOs would be able to influence it both informally and formally. As this it is not the case, informal interactions cannot automatically be considered as the best way of persuading Council members.

As has been pointed out earlier, NGOs have already interacted with the Security Council, thereby developing a practical foundation for the establishment of formal relationships. These are, however, mostly subject to the consent of Council member states, and been both vague and capricious, delaying outcomes and rendering them potentially unsatisfactory. Byers and Lindblom hold that the lack of a legal personality in the international sphere renders an individual or an entity largely incapable of participating in an independent capacity in the

⁷⁴⁶ *ibid*

formation of customary law.⁷⁴⁷ For example, formal identity could increase NGOs' influence on the public and on member states, since those that have the reputation endowed by formal identity will quite likely be taken more seriously.

A fundamental constituent of all meetings of the type under discussion is their political authority,⁷⁴⁸ which might depend heavily on the official positions of the participants. They should be attended by heads of state and governments or relevant ministers in order to enable concrete and influential outcomes. If they are attended only by junior officials, their resolutions would not be strong enough to bind authorities. The demand for formal access for NGOs may thus stem firstly from the inability of informal meetings that low-level representatives of Security Council members have mostly preferred to attend.

NGOs have striven to influence the Security Council through numerous proposals, but their efforts, including shared information and suggestions, have been largely disregarded or blocked, as can be seen from previous cases. Interested NGOs have been dismayed by this state of affairs. By way of illustration, governments have tended to send only low-level officials to meetings with NGOs; in fact, some have even chosen not to participate.⁷⁴⁹ Formal access to the Council might be essential to encourage its members to consider seriously the work of NGOs in the decision-making process. For example, when the ICRC was granted UN observer status in 1991, it strengthened its access, including regular meetings with Council

⁷⁴⁷ Byers (1999), p.86; Lindblom (2005), p.106

⁷⁴⁸ The Department of Economic and Social Affairs of the UN Secretariat 'The United Nations Development Agenda: Development for All' (New York, 2007) p.8

⁷⁴⁹ Paul (2004)

Presidents.⁷⁵⁰ Of course, formal access to the Security Council would provide more efficient opportunities for access. The further development of current informal mechanisms would therefore bring NGOs into close contact with high-ranking governmental representatives such as members of the Council and other leading UN officials.⁷⁵¹

It would also encourage more NGOs to share their sources with Council and work with it. Formal participation would draw more attention to NGOs and encourage them to cooperate more with the Council. In short, taking NGOs seriously would encourage them to work more actively.

The formal participation of NGOs would provide the Security Council with the opportunity to regularly receive consultative opinions that are absolutely essential for its operations. Archibugi indicates that the Council should seek consultative opinions more often.⁷⁵² However, informal meetings depend on the will of Council members, particularly permanent ones. NGOs are often not able to provide their resources to the Council because of their limited access. For example, many proposed briefings by NGOs were stalled because of political objections to the subject matter. Kashmir and the Sudan are two noteworthy cases.⁷⁵³ Paul also indicates that:

[w]hen the P-5 have strong positions, as they often do, NGOs encounter immovable opposition. On sanctions reform, Chechnya, the Middle East, Iraq, and many other important issues, even the most vigorous NGO advocacy runs

⁷⁵⁰ *ibid*, p.376

⁷⁵¹ Martens, 'NGOs in the UN System', p.20

⁷⁵² Archibugi (2008), p.165

⁷⁵³ Paul (2004) p.380

*into the brick wall of P-5 opposition (especially from United States), as national interests block key NGO concerns.*⁷⁵⁴

Thus, informal access cannot overcome arbitrary treatment by Council members, even in urgent cases. Informal channels are under the control of the Council's member states, and particularly of the permanent members. If NGOs were to be granted formal access, they would be able to vitiate such arbitrary treatment.

Some may object that formal access would undermine NGOs' nature. This implies that NGOs would become less mindful of their fundamental goals, and that they could become self-interested actors, as states are.

Nonetheless, the present proposal is for formal participation rather than membership of the Security Council, so that NGOs would not have same status as the Council's member states. In fact, NGOs have already been granted formal participation in ECOSOC. If participation on this basis were contrary to their natures, significant numbers of NGOs would not have applied for consultative status at that body. Of course, no actor can be guaranteed not to become self-interested or to deviate from its fundamental principles. This is something that can only be dealt with when it occurs. In any case, predictions can be made from previous practice. It is thus held that NGOs are not likely to be worse than states.

The involvement of new actors in the international arena has been regarded as an acknowledged fact, and enabling them by allowing them access to channels of participation

⁷⁵⁴ *ibid* p.385

in the formal system is the concern of many.⁷⁵⁵ The Panel Report emphasises that “direct NGOs relationship with UN organs will remain important and that it should be kept formal”⁷⁵⁶. The Panel thus indicates that the existing interactions between the Security Council and NGOs should be formalized.⁷⁵⁷ As the Council is an international organ, it should not remain reluctant to grant formal access to NGOs in a changing international environment in which international organizations have been urged to consider the participation of new actors. Otherwise, the Council will continue to lack democracy, accountability and effectiveness. In similar vein, Thomas Frank states that “fairness of discourse requires fairness in the selection of participants”.⁷⁵⁸

At present, the term “global discourse” assumes a conversation between nations. The author’s contention is that that limited view is wrong. Not only is it inaccurate, overlooking the many actors – multinational corporations, churches, service organizations, gender- and ethno-culturally specific groups, scientific networks, and a myriad of others – who are already part of this discourse.⁷⁵⁹ Crucially, the model’s defect lies in its unfairness.⁷⁶⁰ This approach might imply that not representing other voices would produce inequality. Accordingly, fairness and openness are the most significant requirements for developing more democratic institutions.⁷⁶¹ When the deficits in the Security Council are considered, NGOs would be significant partners with the Council in increasing its democracy, effectiveness and

⁷⁵⁵ Boutros-Ghali (2000), p.105

⁷⁵⁶ Emanuele Rebasti and Luisa Vierucci, 'A Legal Status for NGOs in Contemporary International Law?' (2002), p.10, <http://www.esil-sedi.eu/sites/default/files/VierucciRebasti.PDF> accessed on 31/12/14

⁷⁵⁷ A/58/817, proposal 12

⁷⁵⁸ Franck (1998) p.484

⁷⁵⁹ *ibid*

⁷⁶⁰ *ibid*

⁷⁶¹ Santivasa (n198), p.402

accountability.⁷⁶² Hence, formal access would enable NGOs to make concrete contributions that are not likely to be made via informal meetings. NGOs' formal access to the SC is required by the insufficiency of informal interactions and the undeniable facts of the current world order.

⁷⁶² Santivasa argues that "...more representation by NSAs would serve to reduce the deficit in international law-making and implementation." *ibid*

6.3 Concluding Remarks

In conclusion, as is observed above, the outcomes that informal access has produced cannot be denied. It is also undeniable that the very fact of having access to the Council is a major achievement because gaining admission to an institution that has deliberately tended towards exclusiveness is not easy. Paul emphasizes that the presence of NGOs in this state-based “club reflects tectonic shifts in the international order”.⁷⁶³ It is therefore a remarkable success even to have gained informal access to the Council. Yet the international legal order has been evolving rapidly, a reality with which the Council has failed to keep pace.

Notwithstanding the outcomes of informal relations, it is necessary to transform these to a formal mode. This is mainly because informal relations provide only limited access to NGOs and thus does not permit them to operate efficiently. Limited access can only bring limited success. Given the fact that the issues with which the Council deals are related to international peace and security, it is essential to take appropriate measures in a timely manner. Informal access is far from meeting this requirement, since it depends on the good will of member states and takes a long time to reach a decision. As discussed in Chapter IV, NGOs should therefore be granted at least a partial legal personality that would allow them to perform more efficiently. When NGOs’ access is strengthened, their achievements would commensurably improve. Formal participation on the Council is thus important in the current conditions.

⁷⁶³ Paul (2004), p.386

Lastly, Bardo Fassbender highlights how the obstacles that face NGOs every time they try to access the Council have “given way to a certain ennui or resignation of the interested governments and nongovernmental organizations”.⁷⁶⁴ Paul likewise observes that “NGOs are often dismayed by the realpolitik that they observe and by the needless human suffering that so often results”.⁷⁶⁵

In the light of these facts, it cannot be argued that informal relations between NGOs and the Security Council have been satisfactory. Translating relationships into a formal mode would enhance the Council’s capabilities, as NGOs would be able to provide more resources more efficiently, and also because the Council would be able to address the realities of the current international legal order.

⁷⁶⁴ Bardo Fassbender, ‘Pressure for Security Council Reform’ in Malone (2004), p.341

⁷⁶⁵ Paul (2004), pp.385-386

CHAPTER SEVEN

Proposed Framework for Formal Access and Criticisms

7.1 Establishing a Subsidiary Body: the Consultative Committee of the Security Council (CCSC)

There is a multitude of processes for granting NGOs access to UN organs,⁷⁶⁶ many of which resemble ECOSOC's procedure. That procedure is the starting point for NGOs to obtain access to the UN.⁷⁶⁷ Granting formal Security Council access to NGOs could likewise reflect ECOSOC's procedure. The first way to establish formal relations between NGOs and the Security Council is to add a paragraph to one of the appropriate Articles of Chapter V of the UN Charter. For example, a paragraph could be added to the Procedure section of this Chapter, and a second paragraph could be added to Article 29 as follows:

The Security Council may make suitable arrangements for consultation with non-governmental organizations that are concerned with matters within its competence.

Of course, such a step would require a Charter amendment, which would require the votes of the permanent Council members.⁷⁶⁸

⁷⁶⁶ Ruth Alice Houghton, 'A Puzzle for International Law: NGOs at the United Nations' (2014) 2 North East Law Review, pp.1-24, p.16

⁷⁶⁷ "A subsidiary body of the Economic and Social Council, the United Nations Committee on Non-governmental Organisations, comprises nineteen member states that recommend NGOs for consultative status." *ibid*

⁷⁶⁸ Article 108 of the UN Charter

It is therefore more logical to consider an alternative way of establishing formal relations between NGOs and the Council, one that would not (at least legally) require the affirmative votes of the permanent members. The word “legally” is used here as it refers to the UN Charter’s explicit requirement for affirmative Council votes in articles such as 27, 108 and 109. On the other hand, the veto-holding powers can challenge other members’ requests by means other than reference to an article of the Charter. They could sometimes do so by arbitrary practices such as the “double veto”, which could occur in cases where the Charter does not authorize the permanent members to block the process; at this point, those members could attempt to make broad interpretations on their own behalf. This amounts to a practical rather than a legal obstacle. The issue of the double veto is discussed later in this chapter.

Another way of granting formal access to NGOs could be to grant them consultative status in the Council under a subsidiary organ.⁷⁶⁹ This proposal suggests that such NGOs constitute subsidiary organs that begin very modestly with largely consultative functions, and that, following the model of NGO status in ECOSOC⁷⁷⁰, they would gain powers slowly over time. The introduction of formal access to the Security Council for NGOs should thus happen through a subsidiary organ with a consultative function, and this access should evolve gradually.

At first sight it might appear quite outlandish to speak of the granting of formal participation rights to NGOs. However, closer examination reveals that this has already occurred at the

⁷⁶⁹ Wapner (2007), p.258

⁷⁷⁰ Resolution 1996/31 established three types of consultative status: general, special and roster. These three consultation types have different rights.” For more, see <http://csonet.org/content/documents/199631.pdf> and <http://csonet.org/?menu=83> accessed on 11/08/14.

international level.⁷⁷¹ The concept of NGOs' participation in global governance is as old as the United Nations⁷⁷², and this idea has been realized to some extent in the UN system. In this context, a proposal for formal access could be partly based on the sample structure of previous instances of participation such as that of ECOSOC.

Some scholars suggest granting permanent participation, such as consultative status, to NGOs on the Security Council.⁷⁷³ However, these suggestions have been cursory in the extreme. Specifically, they provide no background information regarding such issues as why and how such formal participation should take place and what reasons there are for requesting such participation. This dearth of research on the subject means that the present argument has nothing to be compared to.

While it is true that no article of the Charter has provided for formal NGO access to the Security Council, there is no conceptual reason to preclude it.⁷⁷⁴ The report of the General Assembly and Economical and Social Council proposes consultative status for NGOs in the

⁷⁷¹ Delbruck (2004), p.43. Many formal relationships have been established between NGOs and other international entities. One of the chief examples of participation of NGOs is Article 15 of International Tropical Timber Organization (ITTO) Agreement of 2006, which provides for access by NGOs. Article 15(1) authorizes the Organization to make arrangements as appropriate for consultations and cooperation with NGOs. <http://www.itto.int/itta/> accessed on 03/06/2014

⁷⁷² Julius Huxley, "who founded the United Nations Educational, Scientific, and Cultural Organization (UNESCO), in 1946, also founded the IUCN in 1948. It was the IUCN that effectively lobbied the UN General Assembly in 1968 to adopt Resolution 1296, which establishes a policy for 'accrediting' certain NGOs. The IUCN is accredited to at least six different UN organizations." See: Henry Lamb, 'Report of the Commission on Global Governance: Our Global Neighborhood' (1995)

⁷⁷³ Archibugi & others (2012) and Murithi (2012), pp.132-149

⁷⁷⁴ Charnovitz (1997), p.278

UNSC.⁷⁷⁵ The report notes that many member delegates have urged that consultative arrangements with NGOs should be extended beyond the Economic and Social Council and its bodies in order to encompass the Security Council and other organs dealing with peace, security and disarmament.⁷⁷⁶

Furthermore, a Panel Report in 2004 makes a four-part proposal.⁷⁷⁷ The first recommendation is to improve Arria Formula meetings by “lengthening lead times and covering travel costs to increase the participation of actors from the field”.⁷⁷⁸ Secondly, it offers Council field missions to arrange regular meetings with “appropriate local civil society leaders, international humanitarian NGOs and perhaps others, such as business leaders and United Nations Headquarters and field staff should facilitate the meetings”.⁷⁷⁹ Thirdly, the report suggests the establishment of an experimental series of Council seminars where emerging issues would be discussed with civil society and “other constituencies as well as United Nations specialists, such as special rapporteurs”.⁷⁸⁰ The Report aims to develop more formal

⁷⁷⁵ This report was published as long ago as 1994. There are two possible reasons why its recommendation has not been implemented since. The first is that, as mentioned earlier, approaches to the issue of Security Council reform use state-based solutions. The formal participation of NGOs has not been discussed in detail, so it could not be progressed beyond suggestions. The second possible reason is that the issues that have been raised in the reports mostly remain within rhetorical discourses; opportunities to implement them are rare. General Assembly Economic and Social Council, Report of the Open-Ended Working Group on the Review of Arrangements for Consultations with Non-Governmental Organizations A/49/215, E/1994/99, (5 July 1994) http://www.un.org/en/ga/search/view_doc.asp?symbol=A/49/215 para.84

⁷⁷⁶ *ibid*

⁷⁷⁷ Report of the Panel of Eminent Persons on United Nations–Civil Society Relations, ‘We the Peoples: Civil Society, The United Nations And Global Governance’ (11 June 2004) UN Document A/58/817, Proposal 12, p.18

⁷⁷⁸ *ibid*

⁷⁷⁹ *ibid*

⁷⁸⁰ *ibid* p.19

relationships between the Council and NGOs.⁷⁸¹ Lastly, it proposes commissions of inquiry that would be independent and would convene after Council-mandated operations.⁷⁸²

In addition, some further proposals await realization in positive law.⁷⁸³ These proposals may not be made directly to the Security Council, yet they might be worth a short mention. First, the Commission on Global Governance recommends “an institutional reform that would provide new global machinery through which warnings could be articulated: the creation of a Council for Petitions in which a new ‘right of petition’ could be exercised by non- state actors”.⁷⁸⁴ They propose a high-level panel of five to seven people who are independent of any states and are selected purely on the grounds of their personal competence. They would be appointed by the Secretary-General with approval of the General Assembly, and would be able make recommendations for “the security of people” to the Secretary-General, the Security Council and the General Assembly. The report believes that this mechanism would provide a direct route from the lowest to the highest levels of global governance.⁷⁸⁵

⁷⁸¹ “The United Nations could also introduce a new instrument that is a bit more formal. Many issues the Security Council now addresses involve a complex array of social and contextual factors and require a clearer deliberative phase, which includes gathering evidence from civil society and other constituencies, before a Council position is negotiated.” *ibid*, pp.45 and 73

⁷⁸² “The Security Council could institute a regular practice of convening commissions to provide independent assessments of United Nations operations under Security Council mandates, such as the one held after the Kosovo crisis. The commissions would include the participation of specialists and would assess operations from the perspective of the citizens concerned and take evidence from civil society.” *ibid*

⁷⁸³ Baslar (2006), p.251.

⁷⁸⁴ Lamb, ‘Report of Commission’ (n772)

⁷⁸⁵ *ibid*

Secondly, the proposals of the report of the Our Creative Diversity would pave the way for a World People's Assembly.⁷⁸⁶ This report recommends the establishment of a two-chamber General Assembly, one chamber consisting of government representatives as at present, the other of representatives from actors from the national civil social sphere. The Commission holds that "not only development strategies should become people-centred: so should all institutions of global governance".⁷⁸⁷ In this regard, the Commission suggests that after the representatives of NGOs are accredited to the General Assembly, they should be grouped together as civil society organizations into a World Forum; they would finally be invited to regular meetings to share their views on key global issues such as the environment, population, ethnic conflict, disarmament, poverty and gender.⁷⁸⁸

The CAMDUN (Campaign for a More Democratic United Nations) was established in 1989 as a project of INFUSA (International Network for a UN Second Assembly), which was formed in 1983.⁷⁸⁹ This movement also worked towards the foundation of an organ of the UN to represent the world's citizens as members of civil society (a UN assembly of peoples), attached to the UN General Assembly.⁷⁹⁰ This idea has also been at several times in different contexts.⁷⁹¹ The main objective of such as proposals was to establish a second assembly

⁷⁸⁶ World Commission on Culture and Development, 'Our Creative Diversity' (1995) <http://unesdoc.unesco.org/images/0010/001055/105586e.pdf> p.62

⁷⁸⁷ *ibid*

⁷⁸⁸ *ibid*

⁷⁸⁹ Frank Barnaby, *Building a More Democratic United Nations: Proceedings of CAMDUN-1* (Psychology Press, 1991)

⁷⁹⁰ *ibid*

⁷⁹¹ Empower the UN, 'The United Nations Assembly Movement: How It Began' <http://empowertheun.com/UNAssemblyMovementTimeline.html> accessed on 29/06/2014

under the General Assembly. This new assembly would involve many representatives including NGOs, mostly by granting them consultative status.

Another eminent commission, the Independent Working Group on the Future of the United Nations, suggests the establishment of a UN Social Council that would “look to non-state representatives to assist in every stage of its work, from early consultations to implementation”.⁷⁹²

As can be observed, these proposals have focused on the foundation of an organ attached to the General Assembly. They aim to influence the Security Council indirectly rather than directly. The important point is that they all intend to increase the role of NGOs by giving them more space. It can therefore be concluded that enabling NGOs to participate in decision-making processes is regarded as important to the international legal order.

On the other hand, these proposals do not specifically refer to the Security Council; rather, they consider NGO participation in the UN system in general terms. There is occasional mention of such participation on the Council in terms of desirability. For example, Brazil’s former foreign minister Antonio de Aguiar Patriota addresses the involvement of civil society in the Council,⁷⁹³ but does not make a clear argument as to whether this should be by formal or informal means. Such proposals do not detail the mechanisms of such participation, nor do

⁷⁹² The Independent Working Group on the Future of the United Nations, ‘The United Nations in its Second Half-Century’ (Yale University Press, 1995), p.36

⁷⁹³ *ibid*

they offer a rationale for it. On the other hand, they do extensively background the informal participation of NGOs.

The first priority has been to offer as realistic and feasible a proposal as possible. Hans Köchler points out that when “statutory predicament” is considered, a realistic approach must be adopted.⁷⁹⁴ Impractical amendments to the Charter have thus not been suggested in the present work.

Archibugi recommends that NGOs recognized by the General Assembly could choose their own representatives on the Security Council.⁷⁹⁵ However; as mentioned earlier, the process must be shortened; NGOs could then share responsibility directly and efficiently. The formal place could thus first be arranged under a subsidiary organ. This proposal therefore suggests a permanent subsidiary organ that would provide for consultation with NGOs during or before conflicts. This means that NGOs would have a permanent position on the Council, and they would thus be able to take effective steps.

NGOs who have been filtered using some criteria⁷⁹⁶ could have access to this subsidiary body. The NGOs recognized by the Council might constitute a “Consultative Committee”, which would most likely be the Consultative Committee of the Security Council (CCSC).

⁷⁹⁴ Köchler, ‘Security Council Reform’ p.7

⁷⁹⁵ Archibugi (2008), p.165

⁷⁹⁶ There should be some criteria according to which NGOs must comply with certain requirements. There would be a process of electing NGOs that would allow access to the Security Council. The structure of ECOSOC’s relationships with NGOs could be regarded as a template for establishing formal interactions between the Council and NGOs.

This should be an exclusively consultative body of the Security Council. NGOs would be participants rather than Council members.⁷⁹⁷ As mentioned in Chapter 4, NGOs would have partial legal personality by obtaining formal participation rights in the Council. Theirs would be a limited subsidiary body, as it is to be expected that they would progressively increase their influence. The main feature of these subsidiary bodies would be to perform distinct functions that the Security Council itself does not exercise.⁷⁹⁸ The proposed CCSC would gather and analyse information in order to prepare recommendations on possible action and to support such action as the Council may mandate.⁷⁹⁹ The CCSC's general activities would encompass advocacy and policy design and implementation.⁸⁰⁰ In this regard, the CCSC would be able to conduct the following activities:

Providing first-hand information and documentation: there could be three types of occasion for which the Security Council would need information. It may not be able to discover the truth, it may wish to delay discovering the truth, and it may not wish to discover the truth at all. For example, the present author is unsure which of these categories contains the example is that the Russian government denied any involvement in the Ukraine crisis; the NGO Vice News uncovered the truth.⁸⁰¹

Moulding public opinion: the CCSC could sensitively but more actively mould public opinion to increase pressure on the Council.

⁷⁹⁷ Willets, (2000), pp.206-207. An ECOSOC Resolution also refers to this difference which concerns the participation of NGOs in International UN Conferences. ECOSOC Resolution 1996/31, para.50

⁷⁹⁸ Danesh Sarooshi, 'The Legal Framework Governing United Nations Subsidiary Organs' (1997) 67 British Yearbook of International Law, p.413

⁷⁹⁹ Herein, Wilenski mentions about necessity of receiving such support for the SC. Wilenski (n75), p.455

⁸⁰⁰ See more in Chapter III

⁸⁰¹ VICE NEWS, Selfie Soldiers: Russia Checks in to Ukraine, <https://news.vice.com/video/selfie-soldiers-russia-checks-in-to-ukraine> accessed on 22/06/15

Identifying and analysing problems to be discussed by the Council: this would go together with moulding public opinion when the Council does not take cognizance of a problem or is unwilling to take action. The aforementioned Stanley Foundation and the International Peace Institute (IPI) have been actively discussing peace and security issues by private conferences and roundtable meetings in order to put them onto the Council's agenda.

Developing alternative solutions and suggesting the best: the CCSC could support peaceful means or other alternatives to avoid military operations. For example, the Quaker United Nations Office (QUNO) has arranged informal meetings with delegates and experts to develop peaceful means for dealing with conflicts and disputes. Likewise, the ICRC has offered its services to maintain agreement between warring parties.⁸⁰²

Actively monitoring the decision-making process: by this means the CCSC could detect obstacles that prevent the Council from taking action, and also from seeing its own position more clearly. It could allow the emergence of proper solutions to overcome gridlocks in the Council's decision-making mechanism.

Verifying the implementation of decisions: the CCSC would closely monitor this in order to reduce the number and impact of wrongful actions that could worsen situations in conflict areas. For example the ICRC has assumed a significant role in protecting human rights both during and after international conflicts.⁸⁰³ It has been more efficient in this regard than any other NGOs in that field, as it has been granted special status under the Geneva Conventions and Protocol.⁸⁰⁴ This illustrates that how an NGO could contribute more to the Security Council by granting formal access.

⁸⁰² Kaczorowska (2010), p.810

⁸⁰³ *ibid*

⁸⁰⁴ *ibid*

In this case such access could be set up without having to modify the UN Charter.⁸⁰⁵ All that would be required would be to apply Article 29, which states that “[t]he Security Council may establish such subsidiary organs as it deems necessary for the performance of its functions.”⁸⁰⁶ That article therefore provides that such a new organ could be established directly by the Council’s non-permanent members. This article is also reflected in Rule 28 of the Provisional Rules of Procedure: “The Security Council may appoint a commission or committee or a rapporteur for a specified question”.⁸⁰⁷

Authority for establishing a subsidiary body is bestowed not only by Article 29, and not only for the Security Council. Article 7(2) also provides for a general authority: “Such subsidiary organs as may be found necessary may be established in accordance with the present Charter”. Likewise, Article 22 empowers the General Assembly, which “may establish such subsidiary organs as it deems necessary for the performance of its functions”. Lastly, Article 68 confers identical power on ECOSOC: “The Economic and Social Council shall set up commissions in economic and social fields and for the promotion of human rights, and such other commissions as may be required for the performance of its functions”. The Coordination Committee of the San Francisco Conference pondered whether the general

⁸⁰⁵ See Jeffrey Segall’s proposal for a consultative assembly for the General Assembly. Jeffrey J. Segall, ‘Building World Democracy Through the UN’ (1990) *Medicine and War*, Vol.6, pp.275-285

⁸⁰⁶ As discussed earlier, Article 29 is a procedural matter and Article 27(2) states that “decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members”. There is thus no requirement for the affirmative votes of permanent members, as nine votes of the non-permanent members would be enough

⁸⁰⁷ <http://www.un.org/en/sc/subsidiary/>

provision of Article 7(2) is adequate for all subsidiary organs, eventually concluding that modified versions of Articles 22, 29 and 68 should be retained.⁸⁰⁸

The main purpose of subsidiary organs is to provide assistance to the Security Council on those occasions when it is unable to perform its primary responsibilities efficiently. Such subsidiary organs could provide support for the Council's duties of investigation, negotiation, administration and service provision.⁸⁰⁹ For example, after the terrorist attacks on the United States on 11 September 2001, the Council found it necessary to establish a committee concerning counter-terrorism.⁸¹⁰ Interestingly, the first resolution regarding this issue does not make any reference to civil society, neither in Resolution 1373 (2001) nor in Resolution 1624 (2005); the resolution adopted in 2010, on the contrary, made reference to the importance of civil society.⁸¹¹ Demand might have played a fundamental role in this sea change in the Council's attitude.

According to Sarooshi the literature on UN subsidiary organs is not extensive because scholars have paid little attention to the subject.⁸¹² There are two main requirements for establishing a subsidiary organ. The first is for it to be in fact subsidiary, and the second is that its establishment must be deemed necessary for the performance of the Security

⁸⁰⁸ Andreas Paulus, 'Article 29' in Bruno Simma, Daniel-Erasmus Khan George Nolte & Andreas Paulus (eds.), *The Charter of the United Nations* (3rd ed., OUP, 2012), p.987

⁸⁰⁹ *ibid.*, p.986

⁸¹⁰ The Repertory of Practice of the United Nations Organs, Supplements Nos. 10 (2000-2009), http://legal.un.org/repertory/art29/english/rep_supp10_vol3-art29_e_advance.pdf

⁸¹¹ Resolution 1963 (2010) encourages interaction and says: "[r]ecognizing the importance of the support of local communities, private sector, civil society and media for increasing awareness about the threats of terrorism and more effectively tackling them"

⁸¹² Sarooshi (n798) p.413

Council's functions.⁸¹³ In the case of the CCSC, these two requirements already exist: it aims to be an organ under the control of the Council, and it is acknowledged that the Council has significant problems with its efficiency.⁸¹⁴ The number of subsidiary organs has indeed increased after the Cold War.⁸¹⁵

In fact, the Repertory of United Nations Practice states that there is no categorical definition of "subsidiary organ".⁸¹⁶ Article 29 has been used to establish three types of subsidiary organ: standing committees or commissions that deal with recurring issues, commissions or committees that deal with specific subjects in the field, and ad hoc committees that treat single issues and peacekeeping and territorial administration.⁸¹⁷

A permanent CCSC could have similar functions to those provided in Article 71, which establishes consultative status for NGOs. However, such a body has not been established under Article 29. It is therefore suggested that the maximum effectiveness approach should be applied in order to eliminate possible inhibitive reactions that could be based on legal provisions. Schweigman states that

⁸¹³Paulus (n808), p.986

⁸¹⁴ This point is argued in Chapter III

⁸¹⁵Paulus (n808), p.995

⁸¹⁶ Leland M. Goodrich, Edward Hambro and Anne Patricia Simons, *Charter of the United Nations: Commentary and Documents* (3rd ed., 1969, Columbia University Press), p.102

⁸¹⁷ Ibid, p.236

*the open-texture of Article 29 and the innovative use made of it by the Council recently, have led to the question of the exact scope of the Council's powers under the Article.*⁸¹⁸

As there is a lack of clarity regarding what it prescribes, prohibits and delineates by way of conceptual boundaries, it permits interpretation according to circumstances.

Sarooshi also maintains that the UN Charter must be interpreted in accordance with the interpretative principle that a treaty provision should be read in the context of the treaty as a whole.⁸¹⁹ Other provisions could likewise be used to support the establishment of the CCSC. Rule 39 of the Provisional Rules of Procedure of the Security Council states that

*The Security Council may invite members of the Secretariat or other persons, whom it considers competent for the purpose, to supply it with information or to give other assistance in examining matters within its competence.*⁸²⁰

⁸¹⁸ Schweigman (n48) p.48

⁸¹⁹ Sarooshi refers to Article 31(1) of the Vienna Convention on Law of Treaties 1969, stating that "...the interpretation of the Charter, as the constituent instrument of an international organization, requires more emphasis to be placed on the teleological or objects and purposes approach to treaty interpretation rather than upon the literal approach" (n798, p. 423) Other scholars apply the teleological approach: Craig Barker sees Anne Peters' proposed teleological interpretation of Article 27(3) in this light. J. Craig Barker, 'The Responsibility to Protect: Lessons from Libya and Syria' in Robert P. Barnidge (ed.) *The Liberal Way of War: Legal Perspectives* (Ashgate, 2013), p.81. Peters also refers to Article 31 of the Vienna Convention, stating that "the procedural rule of Article 27(3) of the UN Charter which provides for unanimity of the five permanent members could be interpreted systemically, and take into account the responsibility to protect as a 'relevant rule of international law' in the sense of Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT)." Anne Peters, 'Humanity as the A and Ω of Sovereignty' (2009) 20 EJIL, pp.513-544, p.540. As mentioned in the methodology section, Miretski also suggests a teleological interpretation of Article 2(6) by applying the maximum effectiveness principle. Miretski (2009)

⁸²⁰ Rule 39 of the Provisional Rules of Procedure <http://www.un.org/en/sc/about/rules/chapter6.shtml>

In accordance with the Appendix of the Council's Provisional Rules of Procedure, the Council can receive written statements from "private individuals and non-governmental bodies".⁸²¹ Each of these provisions could be applied to exert leverage against restrictive reactions based on legal assumptions.⁸²²

As usual, however, there is a risk that the arbitrary⁸²³ practices of permanent members can obstruct the establishment of such a subsidiary body. The veto-holding powers have managed to controversialize⁸²⁴ the decision of whether an issue is procedural or substantive.⁸²⁵ In fact, the UN Charter does not authorize permanent Council members to determine the questions they will veto.⁸²⁶ This has not prevented those powers from expanding their privilege as much as possible.

Nevertheless, there are three scenarios that can be expected. The first is that the permanent members would regard the issue as a substantive one and reject it using the double veto power. In this case, NGOs would need to continue to exert pressure on the permanent members until they finally obtain formal status. The second scenario takes place when it becomes evident that the reaction of the permanent members is restrictive, in which case the

⁸²¹ Lindblom (2005), p.374

⁸²² Article 31(2) of the Vienna Convention on the Law of Treaties states that "[t]he context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes..."

⁸²³ "For neither the words nor spirit of the Charter require that the judgement of one permanent member should make a procedural question substantive when seven of the other members in good faith conclude that it is clearly a question of procedure." Köchler (1991), p.20

⁸²⁴ "One of the most controversial issues has been the voting requirement for establishment such organs." Goodrich, Hambro & Simons (1969), p.236

⁸²⁵ Andreas Zimmermann, 'Voting: Article 27' in Simma & others (2012), p.897

⁸²⁶ "Although the Charter regulations tend to restrict the exercise of the veto, the permanent members constantly expand its realm of application as dictated by their considerations of power politics." Köchler (1991), p.5

principle of maximum effectiveness would be applied on behalf of the world community to eliminate the double veto obstacle.⁸²⁷ It would eventually be possible to establish the CCSC in which NGOs would enjoy formal status. They would progressively increase their influence in the Council to further access the decision-making process. In the last scenario, all Council members including the permanent ones would approve formal access for NGOs. The plausibility of this scenario is proved by the case of the obstructive role played by Russia in particular to the establishment of subsidiary bodies: while Russia insisted on treating the issue as substantive, other Council members were perfectly willing to view it as procedural.⁸²⁸ It might mean that the Council's members are generally intent to consider the fact as procedural. For example, increase in the number of subsidiary bodies has occurred after the Cold War period when the Russia obstacle was not insuperable.

In fact, the Security Council has established many subsidiary organs. In some cases the veto powers consider the matter as substantive, while others are regarded as procedural by consensus or because the elected members or the Council President has persuaded the veto powers to do so. The author therefore believes that the veto poses no insuperable obstacle.⁸²⁹ The case would indeed be determined according to circumstances, which depend on the agent factor. Likeminded Council members, including the permanent ones⁸³⁰, a decisive Secretary-General and Council President⁸³¹ and of course continuous pressure from NGOs would play a

⁸²⁷ Miretski (2009), pp.10-11

⁸²⁸ See Sarooshi (n798), pp.443-446. Russia is the only dissenter in the Security Council regarding this issue; the US, the UK and France are favourable to a procedural treatment.

⁸²⁹ This is because the veto powers render the establishment of subsidiary organs difficult but not impossible. Paulus (n808), p.994

⁸³⁰ The UK and France are quite amenable to working with NGOs

⁸³¹ For example, Diego Arria, Francesco Paolo Fulci and Boutros Boutros-Ghali have made significant contributions to the development of relationships between the Council and NGOs

key role in the granting of formal access. Köchler gives an example that illustrates how the permanent members' arbitrary behaviour can be challenged. He states that

*the permanent members' overbearingness and self-provided increase in power status through the "double veto" have been undermined to a certain extent since the treatment of the Formosa Case in the Security Council.*⁸³²

This refers to the complaint regarding the armed invasion of Taiwan on 29 September 1950.⁸³³ The President of the Security Council, Gladwyn Jebb, referred to the Rule 39 of the Provisional Rules of the Security Council. The President's ruling was upheld by a majority of nine votes, and confirmed the procedural character of the question of inviting a representative for the aim of providing information, even though China had exercised its veto.⁸³⁴ The Council President justified his decision with following statement:

*I think that if such a situation as this is allowed to stand, a very grave precedent will have been created which may well impede the whole functioning of the United Nations in the future. I do not believe, therefore, that in the general interests of all of us it should be allowed to stand, and I consequently rule as President that, notwithstanding the objection of our Chinese colleague, the vote which the Council took this morning on the Ecuadorean resolution is procedural.*⁸³⁵

According to Köchler,

⁸³² Köchler (1991) p.19

⁸³³ 'Voting' Case 86, p.157 http://www.un.org/en/sc/repertoire/46-51/46-51_04.pdf

⁸³⁴ On several occasions China insisted on characterizing the ruling as "ultra vires"

⁸³⁵ 'Voting' Case 86, p.162 http://www.un.org/en/sc/repertoire/46-51/46-51_04.pdf

*this was the first time that the President employed the presidential ruling according to Rule 30 of the Provisional Rules of Procedure to prevent the arbitrary use of the “double veto” by a permanent member who was involved in a dispute.*⁸³⁶

The Formosa case demonstrates the possibility of overcoming the arbitrary behaviour of the permanent members. The “double veto” power cannot be considered as provided in Article 27(3). It is more likely that the veto powers could be persuaded to obey the rules of the Charter than that an amendment could be introduced to that Charter that constrains the permanent members in particular. The double veto is a debatable issue; it should certainly not be considered as an obstacle as much as veto power that raises directly from Article 27(3). This is to say that establishing a subsidiary organ using the Charter’s current provisions has more chance of success. The controversial nature of this issue also applies to the veto, which therefore cannot be regarded as an obstacle pure and simple. Cohen maintains that existing precedents demonstrate the possibility of limiting any abuse “in the exercise of any so-called double veto”.⁸³⁷

Furthermore, Article 29 has not been used to establish a subsidiary organ whose function is identical to the proposed CCSC. There are, however, some examples of subsidiary organs that refer to the participation of NGOs. One of these is the Security Council Working Group on Peacekeeping Operations, established in 2001 to strengthen cooperation with troop-contributing countries in order to enhance the effectiveness of the United Nations in

⁸³⁶ Köchler, (1991), p.19

⁸³⁷ Benjamin V. Cohen, *The United Nations: Constitutional Developments, Growth, and Possibilities* (Harvard University Press, 1961), p.13

addressing conflict at all stages, from prevention through settlement to post-conflict peace building.⁸³⁸ Yet by 2013 cooperation had begun to include NGOs, as a Security Council Resolution stated:

*Support peace consolidation and inclusive political processes and through their good offices, advice and support, as well as by their ability to deter threats to the ongoing peace process, and facilitate consultation process among local population and civil society to help them contribute to national processes and discussions, and upon request, provide security, technical, logistic and administrative support to representative electoral processes, within the limitation of its capacities and resources...*⁸³⁹

In addition, the Security Council Working Group on Children and Armed Conflict was established by Council Resolution in 2005.⁸⁴⁰ The resolution of this subsidiary organ makes direct reference to the participation of civil society:

*Underlines further that this mechanism must operate with the participation of and in cooperation with national Governments and relevant United Nations and civil society actors...*⁸⁴¹

Lastly, there is Peace-building Commission (PBC) that was established by the UNSC Resolution and General Assembly Resolution in 2005.⁸⁴² This subsidiary body was formed to develop strategies for post-conflict regions in order to conclude sustainable development.

⁸³⁸ <http://www.un.org/sc/committees/wgpkco/>

⁸³⁹ UN Security Council Resolution 2086, S/RES/2086 (2013)

⁸⁴⁰ <http://www.un.org/sc/committees/WGCAAC/>

⁸⁴¹ S/RES/1612 (2005)

⁸⁴² S/RES/1645 and A/RES/60/180

The Resolution for this subsidiary body explicitly indicates importance of participation of NGOs as it read:

*Recognizing the important contribution of civil society and non-governmental organizations... and Encourages the Commission to consult with civil society, nongovernmental organizations...*⁸⁴³

These examples show that the Security Council is used to establishing subsidiary bodies that allow NGO participation. Examination of their resolutions makes it clear that they have mostly agreed to recognise and encourage cooperating with civil society. The CCSC would embody two main factors; the provision of effective and direct participation for NGOs and a comprehensive set of purposes. What the Council would need to do, therefore, is to establish a comprehensive subsidiary organ that would provide direct and effective participation for NGOs, rather than making suggestions or making tangential and fleeting references to them.

As can be seen from these examples, subsidiary organs had previously dealt with specific circumstances such as the aftermath of conflicts, or with particular issues such as children and armed conflicts. The Repertory of Practice of the UN Organs mentions some of these special-purpose subsidiary organs. The Council has established “special political missions and peace-building offices” to support peace processes, conflict prevention and peace-building efforts, “working groups” to discuss a range of issues related to the work of the Council such as developing general recommendations on how to improve its effectiveness, and “commissions and investigative bodies” to investigate violations of international humanitarian and human rights law and to investigate all aspects of assassinations of political

⁸⁴³ *ibid*

figures.⁸⁴⁴ The Council has in effect established subsidiary organs to assist it in maintaining international peace and security as well as with its own working methods and procedures.⁸⁴⁵ The proposed CCSC would be able to cover these issues comprehensively.

As mentioned, the absence of a definitive legal veto to this proposal means that the veto poses no obstacle. The lack of a clear definition of subsidiary organs also gives hope for this proposal to be put into practice: if there was such a definition, it could result in limitations.

⁸⁴⁴ The Repertory of Practice of the United Nations Organs, Supplements Nos. 10 (2000-2009), http://legal.un.org/repertory/art29/english/rep_supp10_vol3-art29_e_advance.pdf

⁸⁴⁵ *ibid*

7.2 Critical Evaluation of NGOs in their Formal Participation in the Security Council

The formal involvement of NGOs in the Council should be examined critically. Paul Wapner considers that “NGOs should not be free from harsh scrutiny and critiques simply because they inhabit global society, of which many have an overly romantic understanding”.⁸⁴⁶ Thus, whilst recent criticisms of NGOs are “insightful and extremely important”,⁸⁴⁷ it is essential to critically analyse the formal participation of NGOs in the Security Council by considering counter-arguments.

⁸⁴⁶ Wapner (2007) p.261

⁸⁴⁷ *ibid*

7.2.1 Critics of NGOs' Accountability

The credibility of NGOs is largely great in the areas in which they operate. Surveys conducted between 2001 and 2011 show that NGOs performed better than businesses, governments and media in providing credible information on human rights, the environment and health.⁸⁴⁸ However, there are concerns that NGOs may not be sufficiently accountable.

Some argue that NGOs have an accountability problem, implying that they are not reliable enough actors to be granted formal access.⁸⁴⁹ Edwards and Zadek are concerned about this issue, claiming that “NGOs have no clear bottom line for results and no single authority to whom they must report on their activities”.⁸⁵⁰ Willets maintains that NGOs may be running a democratic deficit, as some are small unrepresentative personal fiefdoms and others represent a wide body of opinion but have no procedures preventing their supporters from influencing their policies.⁸⁵¹ Gartner points out that “one important dimension of accountability which is enhanced by the participation of civil society within international organizations is transparency”.⁸⁵² Grigorescu's study testing some hypotheses across 72 international organizations by using some newly developed measures of transparency shows that NGOs

⁸⁴⁸ Richard Edelman, *Trust Barometer 2005: The Sixth Global Opinion Leaders Study* (2011) <http://www.edelman.com/insights/intellectual-property/edelman-trust-barometer-archive/> accessed on 07/12/2015

⁸⁴⁹ This is an observation the author first encountered in presentations

⁸⁵⁰ Michael Edwards & Simon Zadek, ‘Governing the Provision of Global Public Goods: The Role and Legitimacy of Non-State Actors’ in Inge Kaul, Pedro Conceicao, Katell Le Goulven and Ronald U. Mendoza (eds.) *Providing Public Goods: Managing Globalization* (OUP 2003), 209

⁸⁵¹ Willets (2000) p.207

⁸⁵² David Gartner, ‘Beyond Consultation: Civil Society and the Governance of International Institutions’ *Global Economy and Development at Brookings*, 2010, 13

are significant predictors of organizational transparency.⁸⁵³ Thus, NGOs still would have conspicuous role in enhancing democracy.⁸⁵⁴ In fact, as is mentioned in Chapter 8, NGOs could make significant contributions to the Council even in terms of accountability. It is true that they may have accountability issues, but this is no obstacle to their formal participation.

Nevertheless, when consideration is given to how fairly NGOs elect their executives and directors, together with the fact that some establish NGOs merely to make a profit, some to raise funds and not distribute for raised purposes and some to serve specific state interests. The impact this accountability problem has on the issue of granting NGOs formal access cannot therefore be ignored. The *Economist* points out that these organizations could develop bad habits if they are not accountable to anyone.⁸⁵⁵ Likewise, the *New York Times* notes that NGOs

*are now part of the power structure, too. They receive donations from the public and advocate policies that each group claims are in the public interest. As they become part of the established political landscape worldwide, these groups owe it to the public to be accountable and transparent themselves.*⁸⁵⁶

Yet, as mentioned above, while this issue is certainly the subject of debate, it should not be considered as an obstacle to their formal participation. Objections could be overcome by providing some suitable mechanism. In this regard, the question of the role and accountability of NGOs has been received significant attention from both their critics of NGOs and their

⁸⁵³ Alexandru Grigorescu, 'Transparency of Intergovernmental Organizations: The Roles of Member States, International Bureaucracies and Nongovernmental Organizations' (2007) 51 *International Studies Quarterly*, 625-648, 639

⁸⁵⁴ *ibid*

⁸⁵⁵ *The Economist*, *Sins of the Secular Missionaries* (27th January 2000)

⁸⁵⁶ *The New York Times*, 'Holding Civic Groups Accountable' (21 July 2003)

defenders.⁸⁵⁷ Some commentator's views on the problem will be mentioned, and their proposed solutions addressed. Finally, the current study's proposed ways of accounting NGOs for formal access in the UNSC are presented.

Anderson questions the accountability of NGOs:

*If, as has often been claimed during the last twenty or so years, NGOs act as "stand in" representatives of the "peoples" of the world before international organizations, in what sense and to whom are they accountable, if they now stand alongside or supplant states in this role? And in what sense are these international organizations to account to NGOs, why, on what basis, and what principle of justification, if at all?*⁸⁵⁸

In Anderson's view, it is harder to hold NGOs accountable at the international level than the domestic one.⁸⁵⁹ He suggests that NGOs should find ways to discipline themselves and their ideological pretensions in order to remain useful experts and advocates of their causes as a civil society. They should also forgo their excessive fondness for public international organizations. This does mean that they should not establish relations with them. He maintains, however, that these constitute mere faux-legitimacy, as there is no reliable system that could hold NGOs to account in such relationships. This is to say that NGOs' accountability should depend solely on agreements between them and international organizations. Otherwise, NGOs could eventually be seduced into satisfying one particular

⁸⁵⁷ Steve Charnovitz, 'Accountability of Nongovernmental Organizations (NGOs) in Global Governance' (2005) *George Washington Law Faculty Publications & Other Works*, 15

⁸⁵⁸ Kenneth Anderson, 'Accountability as Legitimacy: Global Governance, Global Civil Society and the United Nations' (2011) 36 *Brooklyn Journal of International Law*, 841-890, 843

⁸⁵⁹ *ibid*

international organization's demands while ignoring its own members. The current study therefore also suggests that accountability of NGOs should not only depend on the mechanism of the UNSC, but should also balance their relations with the

*funders of these movements, the philanthropists and foundations that set the priorities, establish the incentives and disincentives, and which represent a whole other set of social and economic pressures upon NGOs and social movements.*⁸⁶⁰

This is indeed a useful way for NGOs to apply self-accounting system as it would improve their credibility against both members of the UN Security Council and its members.

Keohane indicates that NGOs are highly vulnerable to reputational threat: they are very weak actors whose credibility depends on their accountability.⁸⁶¹ For example, an NGO might lose membership and funding if the public becomes aware that it does not use the funds it raises for its stated purposes. In addition, it could be charged for its unlawful action. Wapner outlines the difference between NGOs' and states' accountability.⁸⁶² This does not mean, however, that one is more accountable than other.⁸⁶³ If an individual member of an NGO disagrees with its policy, they would at least be able to withdraw their membership or support. Woodward likewise states that "NGOs are accountable to their members who can withdraw their support at any time".⁸⁶⁴ Wapner also maintains that "members vote with their

⁸⁶⁰ *ibid*

⁸⁶¹ Robert O. Keohane, 'Global Governance and Democratic Accountability' in David Held and Mathias Koenig-Archibugi (eds.) *Taming Globalization: Frontiers of Governance* (Polity Press, 2003) 153

⁸⁶² Paul Wapner, 'Defending Accountability in NGOs' (2002) 3 *Chicago Journal of International Law*, 197-205, p.198

⁸⁶³ *ibid*

⁸⁶⁴ Woodward (n595) p.229

feet. When the NGO no longer expresses their sentiment, they exit”.⁸⁶⁵ In addition, members take their money with them when they withdraw their membership from an NGO.⁸⁶⁶ If any problem regarding an NGOs’ accountability were to occur in the Security Council, it would at least be possible to hold them to account – by contrast with states.

However, this might not be an efficient way to hold NGOs accountable, nor might it be possible for members to monitor their activities. In such cases, states should take responsibility for monitoring NGOs and requesting that they state their funding purposes and sources, as well as scrutinizing their spending. For example, the *Economist* provides a report on auditing NGOs:

*Competition for funds and publicity among the larger NGOs results in a divided movement that is not making the best use of its assets. It also results in the diversion of funds from conservation to institutional survival, self-interest and a lack of transparency.*⁸⁶⁷

Wapner highlights other ways of making NGOs accountable, including boards of directors or advisory councils, collaboration with other NGOs and accountability to states when they wish to obtain accreditation to international institutions.⁸⁶⁸ Likewise, NGOs could likewise be held accountable by a UNSC mechanism that would be established to accredit NGOs to the Council. This mechanism could require that NGOs report their activities and monitor their operations. It would thus be useful for the Council to institute a mechanism that would hold NGOs accountable both before and after formal access was granted.

⁸⁶⁵ Wapner 2002, p.201

⁸⁶⁶ *ibid*

⁸⁶⁷ *The Economist*, ‘Who Guards the Guardians’ (18th September 2003)

⁸⁶⁸ *ibid*, 201-203

Some criticise NGOs for their executives' voting processes. Charnovitz, however, dismisses the notion that representativeness has any bearing on NGOs' accountability,⁸⁶⁹ believing rather that it is more important to determine the usefulness of the organization's ideas than "whether the ideas faithfully represent the views of the NGO's membership". Spiro likewise maintains that NGOs cannot be monitored as 'the democratic state is idealized on the accountability metric, especially by virtue of periodic elections'.⁸⁷⁰ He believes that voting is "a crude tool for keeping governmental authorities in line" as governments could "get away with an awful lot before having to answer to their membership..."⁸⁷¹ He suggests that "the formal inclusion of non-state actors in international decision-making might act more as a restraint on NGO and hold them accountable".⁸⁷² Formal access would certainly also increase the possibility of holding NGOs to account. On the other hand, it could be difficult to monitor an NGO that acts informally, and is thus not subject to any clearly defined rules. The granting of formal access would place certain obligations and responsibilities on NGOs as well as conferring rights. Maragia states that

*recognizing NGOs as legal persons not only enables them to become better actors but also enables the international community to hold them accountable for what they do.*⁸⁷³

Granting NGOs formal access to the Council would thus increase their accountability, as it would involve the imposition of a code of conduct.⁸⁷⁴

⁸⁶⁹ Charnovitz (2005), 34

⁸⁷⁰ Peter J. Spiro, 'Accounting for NGOs' (2002) 3 *Chicago Journal of International Law*, 160-169, 164

⁸⁷¹ *ibid*

⁸⁷² *ibid*

⁸⁷³ Maragia (2002), p.332

⁸⁷⁴ Barbara (n.143) 229

The questions of who such organizations should be accountable to in the UNSC and how they should be held accountable under a formal access regime remain. Some potential answers present themselves.

The present study suggests that the Council could also establish a committee on NGOs similar to the one in ECOSOC, whose standing Committee on NGOs was established by the Council in 1946. One of the main tasks of that Committee is the consideration of applications for consultative status and requests for reclassification submitted by NGOs.⁸⁷⁵ ECOSOC has also established principles that require NGOs to fulfil requirements of representativeness and accountability.⁸⁷⁶ The Council could likewise establish a committee and outline principles on NGOs in order to evaluate the operations of NGOs seeking to be considered for formal access. This committee could also require NGOs to be more transparent about their personnel, funding and activities.

This argument is strengthened by the consideration that it might be risky to leave the question of NGOs' accountability solely in hands of states, whose activities they are likely to criticize. It would thus be unreasonable to expect a state-based mechanism such as the UNSC to be objective.⁸⁷⁷ State-based gatekeeping could also cause NGOs to satisfy the Council at the expense of their members. The present study therefore adds the suggestion that it would be necessary to develop alternative means in addition to the Council mechanism that would hold NGOs fairly to account. NGOs themselves should therefore take steps to be more transparent in their funding, personnel and operations. They could monitor each other's activities when

⁸⁷⁵ <https://www.un.org/development/desa/en/news/ecosoc/ngo-committee.html> accessed on 20/12/2015

⁸⁷⁶ ECOSOC Resolution 1996/31

⁸⁷⁷ Charnovitz, (2005) p.38

they cooperate.⁸⁷⁸ Ultimately, the question of NGO accountability is thus an issue for debate; it should certainly not be regarded as an obstacle.

⁸⁷⁸ This mechanism is given as a peer model by Grant and Keohane. Ruth W. Grant & Robert O. Keohane, 'Accountability and Abuses of Power in World Politics' (2005) 99 *American Political Science Review*, 29-43, 36

7.2.2 Fairness and Objectivity

Some regimes often consider the efforts of NGOs as inimical to their interests, believing that their work is in the interests of some other countries. These governments would therefore resist the involvement of NGOs on a formal basis. For example, permanent members such as Russia and China are very reluctant to recognise the work of NGOs and to cooperate with them. Jeremy states that

*the USA, UK and France are more open to Non-Governmental Organizations (NGOs). On the other hand, Russia and China, also permanent members of the Security Council are suspicious of NGOs. Thus, Russia and China make life for NGOs in their territories much harder.*⁸⁷⁹

They are therefore likely to be the most significant opponents of granting formal status to NGOs. The fact that the leading NGOs are mostly European or American may increase the Council's inequality if they were to be granted formal access. This presents a possible objection to this proposal. Roger Porter observes that

*it is clear that many developing countries view NGOs, which are largely based in and driven by individuals and groups in developed countries, as often hostile to their interests.*⁸⁸⁰

⁸⁷⁹ Interview with Sir Jeremy Greenstock, Chairman of the UN Association in the UK, United Nations Association-UK (London 21 November 2013)

⁸⁸⁰ Roger Porter, 'Efficiency, Equity and Legitimacy: The Global Trading System in the Twenty-First Century' in Roger Porter (ed.) *Efficiency, Equity, Legitimacy: The Multilateral Trading System at the Millennium* (Brookings Institution Press 2004) p.14

There would, however, be some criteria that could be applied when granting formal status to NGOs in the Security Council. ECOSOC uses this procedure: “a[n] NGO cannot be profit-making; it cannot advocate the use of violence; it cannot be a school, a university, or a political party...”⁸⁸¹ The Council can likewise apply its own criteria that accord with its purposes, using a process that would ensure the selection of suitable NGOs to the CCSC.

For example, national NGOs could be excluded from formal participation on the grounds that it is easier for national governments to influence them. Indeed, a government could theoretically shut down a national NGO, “confiscate its assets, and prevent its officers from travelling abroad”, even though the significant political costs involved may make this difficult in practice. (It may also not be entirely effective in preventing the NGO from communicating with the outside world.⁸⁸²) A national NGO would therefore be susceptible to governmental pressure, and may indeed be significantly dependent on its government’s policies.

By contrast to such national NGOs, it is certain that “each international NGO is a distinct entity”.⁸⁸³ International NGOs could locate their headquarters in different countries, meaning that if a state were to prevent an NGO from performing its activities, that NGO would close down its headquarters in that country and reopen them in another. International NGOs are thus difficult to coerce, and are not likely to be dependent on a single state’s policies. It would therefore be possible to prevent NGOs with state or group interests from accessing the Security Council, when they are already subject to pressure from the permanent members.

⁸⁸¹ Willets (2000), p.192

⁸⁸² Willets (2000), p.206.

⁸⁸³ *ibid*

The imbalance objection might be valid to some degree, as it first occurred in 1921 in the dispute concerning the Dutch worker delegate to the ILO.⁸⁸⁴ Be that as it may, this problem is not an insoluble one as regards formal participation of NGOs on the Council. Firstly, Charnovitz points out that “the growing number of NGOs in developing countries may help redress geographic imbalance”.⁸⁸⁵ Secondly, NGOs should not be considered as states. Their membership is mostly international. Besides, even if an NGO betrays its purposes and uses the opportunities presented to it to serve the interests of a particular country, such a state of affairs would be obvious because the actions of NGOs under a formal status regime would be open to public scrutiny. NGOs would ultimately be held accountable for their actions, which would present a disincentive to them to behave in such a way.

Moreover, because the nature of NGOs is different from that of states, they should not be judged on the basis of equal regional division. Antonio Gramsci draws

*the distinction between political society (the police, the army, legal system, etc.) which dominates directly and coercively, and civil society where leadership is constituted through ideology or by means of consent*⁸⁸⁶

In other words, the activities of civil society are mostly based on individual consent, in contrast to the coercive methods employed by states. NGOs as a civil agent should not be equated with states, which are members of political society.

⁸⁸⁴ Ebere Osieke, *Constitutional Law and Practice in the International Labour Organization* (Kluwer Academic Publishers, 1985), p.199.

⁸⁸⁵ Charnovitz (1997) p.276

⁸⁸⁶ Antonio Gramsci, *Prison Notebooks* (Colombia University Press 1975) <<http://libarts.wsu.edu/ccgrs/undergraduate/syllabi/113/405slides3.pdf>> accessed on 19/09/2013

Willems agrees that NGOs and states are different. He considers the latter as negotiators and NGOs as participants. Their functions are distinct, so their contributions to global governance differ.⁸⁸⁷ Even though NGOs may have certain rights and might perform significant roles in international law and international relations, yet they cannot be treated as equal to states or intergovernmental organisations.⁸⁸⁸ They should thus not be considered as representatives of regions or countries.⁸⁸⁹

An NGO founded in Germany might be very effective in Africa. Global Witness, for example, is an NGO with offices in the UK and America, yet its effective discovery of “natural resource exploitation, conflict, poverty, corruption, and human rights abuses worldwide” is well known. One of its reports, “A Rough Trade”, uncovered the blood diamond trade in Angola.⁸⁹⁰ Angola is a southern African country, but it would be incorrect to consider Global Witness as an NGO from a single region (in this case, Europe).

⁸⁸⁷ Willems (2000) , p.208

⁸⁸⁸ Santivasa (n198), p.378

⁸⁸⁹ Further, some may argue that there should be an equal regional division in order to have same number of NGOs from each region in the Security Council. This can be considered as a reflex of state based understanding; because this approach puts the NGOs into character of the states. However, the NGOs in question here should not be seen as a representative of interests of a region, a state or a small group, instead, they should be accepted as representative of some specific problems of all world community.

⁸⁹⁰ Global Witness has also lobbied the SC to stop the trade in minerals fuelling war in Eastern Congo. Consequently, “On 22 December the UN Security Council (UNSC) passed Resolution 1856 extending and broadening the mandate of the UN peacekeeping force in Congo, MONUC. For the first time in its nine year history, MONUC is now mandated to ‘Use its monitoring and inspection capacities to curtail the provision of support to illegal armed groups derived from illicit trade in natural resources’. This should pave the way for MONUC to begin cutting the illicit outflow of high-value minerals which keeps the armed groups operational.” <https://www.globalwitness.org/archive/un-security-council-resolutions-eastern-congo/> accessed on 30/06/2015.

What is more, NGOs' memberships can span the globe, as indeed can their branch offices. The latter are quite different from states embassies founded to maintain their national affairs. This implies that a western-based NGO could indeed be more supportive of the rights of southern people than southern governments.

NGOs play significant roles such as “adding more diversity to the policymaking process and monitoring the gap between governmental rhetoric and governmental practice in policy making implementation”.⁸⁹¹ It is thus logical to expect that the participation of NGOs, even Western- or American-based ones, would be much more active than developed nations on behalf of developing countries. If this were not so, then most developing countries would not oppose NGOs' activities.

The Indian representative of the G-77 made a proposal to a substantive session in Geneva in 1995⁸⁹² according to which

*the whole United Nations system, including United Nations bodies and conferences dealing not only with economic, social and sustained economic growth and sustainable development issues, but also with disarmament, finance, trade, law and humanitarian affairs, should be open to the participation of non-governmental organizations.*⁸⁹³

⁸⁹¹ Sorensen (n444), p.355

⁸⁹² “Report of the Open-ended Working Group on the Review of Arrangements for Consultation with Non-Governmental Organizations on its Second Session” Economic and Social Council, UN Doc. E/1995/83, 6 June 1995, para.13, pp.4-5.

⁸⁹³ *ibid*

In fact, it is by far the developed countries who oppose the participation of NGOs, perhaps because it has mostly been NGOs who have challenged their ultra vires acts.

Some scholars disagree that NGOs can be considered as advocates of states' interests. Philosopher John Dewey stated that "the voluntary associations just spoken of do not coincide with political boundaries".⁸⁹⁴ He cited "associations of mathematicians, chemists, astronomers; business corporations, labour organizations, churches, [who] are transnational because the interests they represent are worldwide".⁸⁹⁵ It would indeed be hard therefore for a single state to encompass global concepts or aspirations. A matter concerning the world community should not be confined within borders of a state. Samsung Galaxy smartphones obviously do not suit only South Koreans. When a scientist discovers a remedy for an illness, everyone around the world who suffers from that illness would benefit.

Charnovitz agrees that NGOs should not be curbed by the national interests of states.⁸⁹⁶ He says that it would be illogical to compel an NGO like the International Chamber of Commerce (ICC) or the International Confederation of Free Trade Unions⁸⁹⁷ "to channel its concerns through its own government".⁸⁹⁸ By his account, the majority of NGOs are more likely to foster socially beneficial policies. He also believes that NGOs have not organized internationally and promote collective goals such as peace and the protection of the global

⁸⁹⁴ John Dewey, *Reconstruction in Philosophy* (Beacon Press, 1948), p.118

⁸⁹⁵ *ibid*

⁸⁹⁶ Charnovitz (1997) p.276

⁸⁹⁷ This merged with the World Confederation of Labour (WCL) to form the International Trade Union Confederation (ITUC) in 2006

⁸⁹⁸ Charnovitz (1997)

commons by mere chance.⁸⁹⁹ While national NGOs may well advocate militarism or protectionism, such aims are unlikely to inspire true international coalitions.⁹⁰⁰ National NGOs could thus be excluded from the Council, as mentioned earlier (see also the definition of NGO in Chapter IV).

The Security Council would moreover actually benefit, as NGOs would share all their potential facilities. The aim of involving NGOs in the Security Council is to develop its capabilities and to challenge its anti-democratic structure. They would thus not gain any advantage from the Council. Thus, because NGOs would deliver rather than receive benefit from such a relationship, the question of equal distribution of benefit does not arise. The participation of NGOs to the Council cannot be considered pragmatically. A country that obtains permanent or non-permanent Council membership could well use such an opportunity to further its own national interests, but the activities of NGOs to a large extent benefit most of humanity. The granting of formal status on the Security Council for either western or southern NGOs should be satisfactory to people from all the world's regions.

⁸⁹⁹ *ibid*

⁹⁰⁰ *ibid*

7.2.3 Whether NGOs are a Threat to International Legal Order

Chandler has criticized the role of civil society in the international realm, emphasizing the negative role of NGOs in international relations:

*[T]he attraction of the global sphere has little to do with changes at the international level; the focus on morality and values in international relations is not the product of an actually existing global civil society, of the campaigns and work of NGOs, 'moral entrepreneurs', or any other providers of information or ethical ideas.*⁹⁰¹

He thereby denies the contribution of NGOs to democracy or other values in international relations, instead considering them as self-interested agents. He thinks NGOs should not be expected to deal with pressing international issues, concluding that “we should perhaps ask less of global society and more of ourselves”.⁹⁰²

That limited description of NGOs, however, is wrong. It would be unfair to ignore the contributions of NGOs have made thus far, as Wapner points out.¹⁰⁹ Their activities have proved crucial in increasing representation. The Secretary-General's report highlights the importance of NGO's participation. The report emphasizes significant aspects of NGOs such as their patience in seeking out peaceful measures, their first-hand, speedy collection of information about conflicts and their ability to rebuild war-torn countries. When the

⁹⁰¹ David Chandler, *Constructing Global Civil Society : Morality and Power in International Relations* (Palgrave Macmillan 2004) p.208

⁹⁰² Ibid p.209

Council's deficiencies are considered, these features are likely to be essential to the Council's work in maintaining international peace and security.

Charnovitz also observes that it would be unfair to accuse NGOs of undermining positive international law while significant numbers of them have helped develop it.⁹⁰³ NGOs' aims would at least be no worse than those of states or terrorist groups. They would in any circumstances contribute more than states. The UN has also been convinced that, in spite of all their problems, NGOs can enhance the Council's skills.⁹⁰⁴

Anderson also considers NGOs as a threat to the supremacy of international law.⁹⁰⁵ He goes further, characterizing the influence of NGOs as "international legal imperialism" and maintaining that international NGOs do not represent local individual voices, but rather reflecting the interests of global transnational elites in the international legal order. Falk and Allott, by contrast, believe that the development of international civil society is a positive phenomenon.⁹⁰⁶ Falk's concept is that

*international movements founded on common interests that cross state borders are active in the international system, but that they are partial, representing particular issues and interests.*⁹⁰⁷

Falk thus refutes Anderson's approach to NGOs' activities, arguing that they are inconsistent with his view of them as "international legal imperialists".⁹⁰⁸

⁹⁰³ Charnovitz (1997) p.277

⁹⁰⁴ Therien & Belanger-Dumontier (n159), p.362

⁹⁰⁵ Anderson, 'The Ottawa Convention', pp. 103-104

⁹⁰⁶ Cullen & Morrow (2001), p.9

⁹⁰⁷ *ibid*

The author also maintains that the development of NGOs should not be considered as a threat. As Falk rightly indicates, NGOs are the products of individual demands. They might certainly be inimical to self-interested groups who have no compunction about violating individual rights. NGOs cannot be regarded as representing the interests only of small numbers of people. On the contrary, their constituency is large. Kelsen's quote must be pointed in this context: he states that it is necessary to "focus on the fact that the real subjects of international law are individuals".⁹⁰⁹ The activities of NGOs should not therefore be regarded as a menace, or as international legal imperialism: in fact, they represent individual interests.

It must be admitted that some NGOs do advocate causes that are deeply controversial and, in some cases, are incompatible with universally accepted norms and principles.⁹¹⁰ This may well be true, but it does not present an obstacle to the participation of NGOs. This concern can be dealt with through ECOSOC's mechanism of applying criteria for NGO membership. The Security Council could do the same in order to exclude undesirable NGOs.

The increase in the numbers of NGOs derives from popular demands, of which they are the agents and executors. They should therefore not be considered as threats to international law. If they were, so could any actor in the international arena. If Chandler's and Anderson's views were carried to their logical conclusion, all states could be considered as threats to

⁹⁰⁸Richard A. Falk, *On Humane Governance*, p.100 and ibid

⁹⁰⁹ Hans Kelsen, *Principles of International Law* (3rd ed., The Lawbook Exchange, 1959), pp.96-99 cited in Miretski (2009), p.3

⁹¹⁰ Fernando Henrique Cardoso, 'Civil Society and Global Governance' High Level Panel on Civil Society, section 3, <http://www.un-ngls.org/ecosoc%20HL%20Panel%20-%20Contextual%20paper%20by%20Mr%20Cardoso%20Chairman.doc>

international law and as deleterious to the international legal order. In fact, the present author does indeed consider NGOs as threats – not, however, to the international legal order by to the self-centred and hypocritical interests of states.

7.2.4 NGOs Potential Undermining of the Security Council's Effectiveness

In addition to all these factors, some believe that granting formal access to NGOs would make the Security Council less effective because of the potential participation of large numbers of NGOs, which might prove impractical. This problem could, however, be addressed in the same way as in ECOSOC's system.⁹¹¹

In fact, the Council has already been suffering from an inefficiency problem. Just the most recent cases of Syria and the Ukraine demonstrate that the Council has much to gain in terms of effectiveness. In truth, it is an organ that does not work well; any negative side-effects of a reform proposal should certainly be taken into consideration, but they should not be regarded as impediments to reform.

⁹¹¹ "In 1950, the arrangements were reviewed and a new resolution (Resolution 288) was adopted by ECOSOC" Lindblom (2005), p.376. The main reason for this resolution was to review relations with NGOs, as there were large numbers of them and it was taking a long time for them to finish their presentations. See Baslar (2006), p.139

CHAPTER EIGHT

Estimating Outcomes of Formal Access for NGOs to the Security Council

8.1 Balancing Veto Power

First and foremost, formal participation by NGOs in the Council's state-based system could provide the necessary checks and balances against the excesses of state collusion in decision-making.⁹¹² Daniele Archibugi similarly maintains that pressure is more influential when exerted by nongovernmental actors,⁹¹³ while Hans Köchler emphasizes that an international organization can properly function only in an order that provides a balance to the holders of power.⁹¹⁴ It is therefore only to be expected that formal access by NGOs might be a counterweight to the intrinsically undemocratic, unaccountable and ineffective institution of the Security Council.

The question of providing such a balance is not an easy one. Other members have thus far failed to exert adequate pressure on the holders of the veto power, mainly because other members' policies have depended largely on those states, and in particular the US and Russia. It would be naïve to think that the elected Council members will in the near future adopt measures to balance the Permanent Five. On the other hand, NGOs are only actors that have managed to influence the permanent members, thanks to the latter's limited sources of

⁹¹² Murithi (2012), p.138

⁹¹³ Archibugi (2008), p.158

⁹¹⁴ Köchler (2006), pp.336-337

informal access. Formal access would give NGOs more latitude to exert their power of influence more efficiently. Several possible answers to the opening question do therefore suggest themselves.

8.2 Sources of Information

As mentioned in Chapter IV, NGOs could provide technical expertise on special topics required by governments.⁹¹⁵ As many sources of information and data are independent, NGOs could supply personnel and resources that governments have been reluctant to provide to international organizations in the interests of compliance.⁹¹⁶ In fact, it is essential for the Council to have adequate sources of technical support in order to increase its capabilities on the ground. The Panel Report of 2015 states that

*[i]n the field, mission leadership should proactively seek objective feedback on progress and trends from independent experts and civil society and track perceptions of the mission.*⁹¹⁷

Likewise, the eminent report of the UN's Independent Working Group sees the Council as potentially "benefiting from early warning and analysis that will permit the more effective exercise of preventive diplomacy".⁹¹⁸ This would deprive the Council of the excuse of not

⁹¹⁵ "NGOs often have more accurate and up-to-date information in specific situations, as they tend to have better and independent sources of information from field situations, in particular during crisis periods. UN delegates also often use the working group's websites, as these sites in some cases provide the most comprehensive source of information on current affairs." Kerstin Martens, 'NGOs in the UN System: Examining Formal and Informal Mechanisms of Interaction' (2004) 2 International Journal of Civil Society Law, pp.11-21, p.19; Charnovitz (1997) pp.274-275

⁹¹⁶ Abram Chayes & Antonia Handler, *The New Sovereignty: Compliance with International Law Regulatory Agreements* (Harvard University Press, 1998), p.251

⁹¹⁷ United Nations A/70/95-S/2015/446, para.179

⁹¹⁸ A Report of the Independent Working Group on the Future of the United Nations, 'The United Nations in its Second Half Century' p.8

having adequate resources to be effective.⁹¹⁹ It might also prevent it from spuriously justifying its wrongful actions.⁹²⁰

It is the author's view that the Security Council, and in particular its permanent members, cannot be unaware of events in conflict areas. Their easy access to significant sources of intelligence must mean that they are fully informed. If this is accepted, it is not possible to maintain that they do not take action, or that they take the wrong actions, because they do not have the necessary information. Such inaction or wrongful action must therefore be deliberate.⁹²¹ NGOs can change this mindset by publicly presenting the Council with the facts regarding a particular situation, making it impossible for the Council to withstand pressure from the international community.⁹²²

⁹¹⁹ In the case of use of chemical weapons in the ongoing Syrian crisis, it would have taken an unconscionably long time to discover the facts if NGOs had not provided the necessary documentation by social media

⁹²⁰ As in the Iraqi invasion of 2003 and the Libyan intervention of 2011

⁹²¹ An example of wrongful action is the Security Council's decision to embark on a military operation in Libya in 2011. During that operation, coalition states bombed civilians and the country's facilities. Ernesto Londoño, 'NATO Confirms It Hit Wrong Target, Killing Libyan Civilians' (19 June 2011) The Washington Post https://www.washingtonpost.com/world/middle-east/nato-says-strike-may-have-killed-libyan-civilians/2011/06/19/AGL7VdbH_story.html accessed 12/07/2015.

⁹²² The Bush administration asserted that there were weapons of mass destruction (WMD) regarding the invasion of Iraq in 2003, but it was later revealed that the administration presented misleading information in order to justify its military operation. See the latest news about this issue at <https://news.vice.com/article/the-cia-just-declassified-the-document-that-supposedly-justified-the-iraq-invasion> accessed on 30/03/15.

8.3 Enhancing Efficiency

Kofi Annan states that “the United Nations relies on to be as effective and responsive as it can be, in the service of the people it exists to represent”.⁹²³ As argued in Chapter III, the lack of effectiveness is one of the main prompters of calls for reform. NGOs’ formal participation in the Council’s decision-making processes would make it highly possible for them to press the Council to take more effective action. Annan holds that

*the overriding purpose of cooperation between the United Nations and non-state actors should be to enable the Organization to serve Member States and their peoples more effectively.*⁹²⁴

He maintains that “cooperation should be viewed as a means of achieving United Nations goals and enhancing performance”.⁹²⁵ It has been acknowledged that NGOs could enhance the efficiency of the Council’s activities⁹²⁶ by supplying “field experience and expertise across a vast array of human concerns, as well as a valuable capacity for information-gathering and dissemination”.⁹²⁷

⁹²³ Kofi A. Annan, ‘Secretary-General, in Message to World Social Forum, Says Urgent Challenges Must Be Addressed by Partnerships among Government, Business, Civil Society’ (4 February 2002) Press Release SG/SM/8113 <http://www.un.org/News/Press/docs/2002/sgsm8113.doc.htm>

⁹²⁴ Kofi A. Annan, ‘Cooperation Between the United Nations and All Relevant Partners, in Particular the Private Sector’ (9 October 2001) The Report of Secretary General to the General Assembly A/56/323, para.115, p.44

⁹²⁵ *ibid*

⁹²⁶ Therien & Belanger-Dumontier (n159), p.361

⁹²⁷ Boutros-Ghali (1996), pp.34-35

NGOs have influenced international law by persuading states to take action without consent.⁹²⁸ Jessica Mathews observes that NGOs are increasingly able to sway even the largest governments,⁹²⁹ and that they have therefore become significant actors in maintaining the supremacy of law.

Moreover, NGOs could establish close, regular relations with top officials of member states, which would allow them to achieve their goals more quickly. In this regard, they could help state officials to examine controversial proposals by providing rapid feedback.⁹³⁰ The Panel Report of 2015 states that

*[i]n the field, mission leadership should proactively seek objective feedback on progress and trends from independent experts and civil society and track perceptions of the mission.*⁹³¹

Formal participation by NGOs could also provide a mechanism for determining reaction to the Council's measures. Testing the value of such decisions in advance would ameliorate the negative responses that might be provoked while increasing the Council's credibility. NGOs could also press reluctant states to compromise over issues that provoke dispute.⁹³²

⁹²⁸ Anderson, 'The Ottawa Convention', pp.103-104.

⁹²⁹ She gives the following example: "when the United States and Mexico set out to reach a trade agreement, the two governments planned on the usual narrowly defined negotiations behind closed doors...Coalitions of NGOs formed in each country and across both borders...After months of resistance, the Bush administration capitulated, opening the agreement to environmental and labour concerns. Although progress in other trade venues will be slow, the tightly closed world of trade negotiations has been changed forever." Jessica T. Mathews, 'Power Shifts' (1997) 76 Foreign Affairs, pp.50-66, pp.53-54

⁹³⁰ Charnovitz (1997) p.274

⁹³¹ United Nations A/70/95-S/2015/446, para.179

⁹³² *ibid*

Under the WWO, states did not bear much responsibility in international law for their actions. This meant that there was no authority by which states could be held to account for their behaviour, and no possible leverage that could be exerted on them to prevent them from taking any particular action.⁹³³ NGOs' increasing activities in the post-Westphalian era have, on the other hand, led to states becoming accountable for their actions.⁹³⁴ Duncan Hollis notes that "there is no doubt that international law recognizes fewer topics today as within the reserved domain of states' respective domestic jurisdictions".⁹³⁵ NGOs could thus cause the Security Council to take action even when its member states were not willing to do so.

⁹³³ For example, there were only 40 states that have declared to recognize the jurisdiction of the International Court of Justice as compulsory. This number equals to a quarter of the Members of the UN (as it was 166 in 1990). This number is currently 72 states. It equals to nearly half of the members of the UN (as it is 193 now). Plus, some major powers have approved compulsory jurisdiction during post-Westphalia period such as UK (2014), Germany (2008), Japan (2007), and Italy (2008). <<http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3>> accessed on 15/07/15

⁹³⁴ Duncan B. Hollis, 'Private Actors in Public International Law: Amicus Curiae and the Case for the Retention of State Sovereignty' (2002) 25 Boston College International and Comparative Law Review, pp.235-255, p.248, and *ibid*

⁹³⁵ *ibid*

8.4 Eliminate Lack of Representativeness

Another consideration that renders the participation of NGOs necessary is the lack of representativeness in the Security Council.⁹³⁶ Tallberg and Uhlin also point out that

*the opening up of international institutions to CSOs expands participation, establishes a complementary channel of representation of citizen concerns and ultimately improves the prospects of those being affected by global decisions to also have a stake in their formulation and implementation.*⁹³⁷

NGOs by nature tend to allow for more direct participation by citizens.⁹³⁸ Scholte likewise maintains that increasing NGOs' participation could enhance public participation in global governance and put the interests of vulnerable and often excluded groups onto decision-makers' agendas.⁹³⁹ National minorities, ethnic groups and those governed by monarchies cannot properly be represented in the international arena. Only some one-third of the world's states are democratic, and even their governments do not represent their entire populations.⁹⁴⁰ Individuals elect their governments, but these pay little heed to their electors' concerns in their foreign policies. Nothing can be said concerning those who did not vote for their current governments.

⁹³⁶ The representativeness capacity of NGOs is mentioned in the Chapter IV.

⁹³⁷ Jonas Tallberg & Anders Uhlin, 'Civil Society and Global Democracy: An assessment' in Archibugi & others (2012), p.216

⁹³⁸ Magdalena Bexell, Jonas Tallberg and Anders Uhlin, 'Democracy in Global Governance: The Promises and Pitfalls of Transnational Actors' (2010) 16 Global Governance, pp.81-101, p.82

⁹³⁹ Jan Aart Scholte, 'Civil Society and Democracy in Global Governance' (2002) 8 Global Governance, pp.281-304, p.293

⁹⁴⁰ Anderson, 'The Ottawa Convention' p.116

In fact, a lack of representation in the sphere of foreign policy did not pose a problem for individuals decades ago because globalization was not an issue, so a problem in one region had little impact on other regions. The current world order, however, compels individuals to concern themselves with conflicts in remote areas.⁹⁴¹ For example, the Ukrainian and Syrian crises may have been causes of apprehension to many, not just because of the potential effect of such far-off events on their lives, but also because the proliferation of news and its easy availability through a variety of media including smartphones means that affecting images of conflicts can have a significant – and significantly negative – emotional impact.⁹⁴²

States thus no longer find it easy to hide their foreign policy faults.⁹⁴³ NGOs have enormous resources with which to mould public opinion. There has been a significant increase in access

⁹⁴¹ “It has been too often confirmed that practices of indignity and strife which begin as internal in physical manifestation in a single community quickly and easily spread to other communities and become international.” Myres S. McDougal & W. Michael Reisman, 'Rhodesia and the United Nations: The Lawfulness of International Concern' (1968) 1 Yale Law School Legal Scholarship Repository, p.13.

⁹⁴² A tragic news item that supports this argument has commanded popular attention around the world. The picture of the lifeless body of Aylan Kurdi, a three-year-old Syrian boy from Kobane, was published by a Turkish news agency. The picture has sparked a massive wave of comment internationally on social media, to the extent that it has apparently been responsible for a shift in attitudes to migration. As a political result, the picture has caused some countries such as Germany to relax their restrictions. Governments whose migration policies are very restrictive have also been put under pressure by petitions with hundreds of thousands of signatures. <http://www.bbc.co.uk/news/blogs-trending-34142804> and <http://www.msn.com/en-gb/news/uknews/2000-britons-offer-to-house-refugees-in-their-homes/ar-AAe0G3g?ocid=mailsignoutmd> accessed 08/09/15

⁹⁴³ When the Iraq war took place, there were significant protests took place around the world, particularly in USA and UK. The Iraq invasion caused severe criticism for Bush and Blair administrations. Consequently, it had impact on politicians' promises too. For example, Obama made promises about withdrawing US army from Iraq and Afghanistan; and he made more peaceful speeches. See: Barack Obama speech about the 'Responsibly Ending the War in Iraq': http://www.whitehouse.gov/the_press_office/Remarks-of-President-Barack-Obama-Responsibly-Ending-the-War-in-Iraq accessed on 02/12/2013.

to communications media, particularly radio⁹⁴⁴, television and film.⁹⁴⁵ These media have served to raise awareness of both problems and opportunities. Boutros-Ghali states that it is possible to persuade people everywhere to request more accountability, more representation and “more participation in governance, [and] eventually, more control over their future and more say in the decisions that affect their lives”.⁹⁴⁶ NGOs have therefore been of prime importance for international organisations since the latter are not able to represent popular demands, let alone to meet them.⁹⁴⁷ NGOs communicate superbly with people at both national and international levels,⁹⁴⁸ so they would be perfect vehicles to give voice to those who are not represented in the international realm.

While states can be seen as a source of the world’s problems, it is often asserted that NGOs are the “voice of the people”.⁹⁴⁹ The Report of Panel maintains that

*Looking to the future, the rise of civil society and the growing voice of the people are creating [a] strong momentum for the spread of democracy and human rights across the globe.*⁹⁵⁰

A concrete example of this is that of

the Royal Dutch Shell Company, [which,] after obtaining approval from the relevant national and international authorities, decided to sink the Brent Spar

⁹⁴⁴ For example, Hutu and Tutsi were set against each other by misleading radio news in the Rwanda genocide.

⁹⁴⁵ Maxwell McCombs, *Setting the Agenda: The Mass Media and Public Opinion* (Polity Press, 2004) pp.1-3.

⁹⁴⁶ Boutros-Ghali (2000), p.107, *ibid*

⁹⁴⁷ Anderson, ‘The Ottawa Convention’

⁹⁴⁸ Because popular representation is a democratic function, the participation of NGOs increases democracy.

Woodward (n595), pp.225-226

⁹⁴⁹ Willets (2000), p.208

⁹⁵⁰ United Nations A/70/95-S/2015/446

*rig to the ocean floor. Greenpeace launched a campaign to boycott Shell gasoline. Within weeks, Shell's sales in Germany were down by 30 percent, at which point Shell chose a course which avoided the sinking of the rig. Since the incident, shell consults Greenpeace regarding the decommissioning of its rigs.*⁹⁵¹

Formal participation of NGOs may ensure that the Security Council is responsive to citizens across the world. An NGO-enriched Council would gain legitimacy by considering a diverse range of viewpoints and reaching decisions in a democratic fashion.⁹⁵² Charnovitz supports this by stating that “NGOs helped to make international law more responsive to the needs of the international community”.⁹⁵³

As discussed earlier, the current world has seen many innovations such as the communications revolution that have engendered an evolution in international affairs. Internet-based tools have hugely facilitated communication, making it easy for people to keep in touch with each other around the world. People have consequently discovered that it has increasingly become possible to share ideas, beliefs and aims with others from different countries or regions.⁹⁵⁴ As a consequence of these developments, the importance of national

⁹⁵¹ PJ Spiro, *New Players on the International stage* (1997) 2 Hofstra L & Pol'y Sump, p.21 cited in Kaczorowska (2010), p.216

⁹⁵² As regards the Council's actions, legitimacy refers to the qualities of legality, credibility and acceptability. Some of those actions can represent a problem in terms of legality, for example the use military force without a valid resolution (or a controversial one, as in the case of the invasion of Iraq in 2003). Furthermore, an action could have legal authorization but may not be deemed satisfactory or even desirable by world opinion. Similarly, a refusal to take action could be legally justified, as in the use of the veto, but this could also be popularly viewed as unsatisfactory and undesirable. Consequently, in these three cases the Security Council could lose credibility.

⁹⁵³ Charnovitz, (2006), p.360

⁹⁵⁴ David Held, *Cosmopolitanism: Ideals and Realities* (Polity Press, 2010), p.27

governmental policies has dwindled.⁹⁵⁵ It has been observed that individual or group global interests have supplanted national interests and policies. People have begun to become members of NGOs in order to have their views represented. Put simply, the participation of NGOs on the Security Council would make the Council more representative. Lack of such representation, on the contrary, would constitute a significant drawback for a main body of the UN whose decisions have such direct and serious impacts on people's lives, and may cause it to totally lose its relevance and legitimacy.

To illustrate this point further, one might consider the consequences for a complete lack of individual influence over their governments' foreign policies. NGOs could in this instance act as an alternative, perhaps even a preferable one on specific issues. NGOs constitute a fundamental form of popular representation in the current world order,⁹⁵⁶ Boutros-Ghali points to the inevitable consequence: "it is not surprising that in a short space of time we have witnessed the emergence of many new non-governmental organizations".⁹⁵⁷ It is also highly possible for people to adopt multiple identities that transcend the conditions of the geographical political jurisdictions in which they live.⁹⁵⁸ An NGO could therefore represent a

⁹⁵⁵ *ibid*

⁹⁵⁶ Boutros-Ghali (2000)

⁹⁵⁷ *ibid*

⁹⁵⁸ That has link with Internet as it allows people to make communication beyond their borders. Jurgen Kurtz, 'NGOs, the Internet and International Economic Policy Making: The Failure of the OECD Multilateral Agreement on Investment' (2002) 3 Melbourne Journal of International Law, pp.213-246, 217 and Schachter (n100), pp.7-24.

more accurate reflection of an individual's personal opinions than the organs of authority in their states – authority for which they may never have voted.⁹⁵⁹

For example, an American citizen who cares deeply about not using force in territorial disputes may determine that their views are better represented by a specific international NGO than by their own government. This case is brought more sharply into focus in non-democratic countries governed by non-elected administrations. Willet observes that the presence of military dictatorships, autocratic feudal regimes or corrupt oligarchies makes it hard to hear these region's voices. He sees NGOs as potential "surrogate representatives of people from undemocratic countries".⁹⁶⁰

Boutros-Ghali also defines roles of NGOs as follows:

*...non-governmental organizations have become increasingly involved with the establishment of democratic institutions, carrying the voices and the needs of the smallest communities to international attention...*⁹⁶¹

He also underlines that

⁹⁵⁹ Kurtz also believes that "an Australian citizen who cares deeply about debt relief for heavily indebted countries may see their interests better represented by a specific interest international NGO than by the Australian Government". *ibid*

⁹⁶⁰ Willets (2000), pp.207-208

⁹⁶¹ Boutros Boutros-Ghali, 'Secretary-General Delivers Lecture at University of Warsaw on 'A New United Nations Objective: Democratization' (10 November 1995) Press Release SG/SM/5809 <http://www.un.org/News/Press/docs/1995/19951110.sgsm5809.html> accessed on 22/07/14

*non-governmental organizations fulfil an essential representational role in the contemporary world, thus, their participation in international organizations is, in a way, a guarantee of the political legitimacy of those organizations.*⁹⁶²

That is to say that NGOs would also be the voice of those who are not represented, or do not feel represented, by their governments. NGOs' remarkable capacity to access knowledge and resources might help bridge the gap between the Security Council and those who are affected by its decision.⁹⁶³ Of course, it is clear that NGOs' formal participation would increase the Council's representativeness and legitimacy.

⁹⁶² Boutros Boutros-Ghali, 'Secretary-General Tells European Parliament Globalization of Economy Must Go Hand-in-Hand with Globalization of Democracy' (10 November 1995) Press Release SG/SM/5810 <http://www.un.org/News/Press/docs/1995/19951110.sgsm5810.html>

⁹⁶³ Therien & Belanger-Dumontier (n159) p.361. See also the Report of the Secretary-General, which states that NGOs are seen "as shapers of policy and indispensable bridges between the general public and the intergovernmental processes". The Report of the Secretary General, A/53/170 (10 July 1998), para.57

8.5 Improving Peaceful Settlement

Granting formal participation rights to NGOs in the Security Council would promote democracy, thereby increasing the Council's ability to solve international conflicts peacefully. This is why NGOs have often become targets of terrorist groups.⁹⁶⁴ NGOs still take many risks to provide humanitarian aids whenever and wherever possible; formal identification with the Council would increase their security in this regard. It is also one of the main purposes of this study to employ the tenets of CD.⁹⁶⁵ These both present the opportunity to overcome conflicts by dialogue rather than by force of arms.⁹⁶⁶ In fact, this point was clarified a decade ago by the World Summit as a "culture of prevention" under the Responsibility to Protect (R2P).⁹⁶⁷ Yet member states could not successfully meet this demand. NGOs are the best means of improving the Council's preventive diplomacy and minimizing the use of military operations.

Barack Obama responds to criticisms of his policy regarding the threat of Iran's nuclear programme by saying that "the absolute best option is a diplomatic resolution".⁹⁶⁸ There is no

⁹⁶⁴ Attacks on March 26 and 27 on NGO and UN offices by a Rakhine mob angered by rumors that a foreign staffer for another group, Malteser International, had desecrated a Buddhist flag led to the withdrawal of aid groups providing healthcare and other essential help to another 140,000 Rohingya living in camps after being displaced by violence since 2012. Reuters, 'Rohingya health crisis in west Myanmar after aid groups forced out' 28 April 2014 <http://www.reuters.com/article/2014/04/28/us-myanmar-rohingya-idUSBREA3R0I820140428> accessed on 21/06/2014

⁹⁶⁵ "Military force is used solely as a last resort when all the other political and diplomatic measures have failed." Archibugi (2008), pp.111-112

⁹⁶⁶ Boutros-Ghali (2000), p.106.

⁹⁶⁷ United Nations A/70/95-S/2015/446

⁹⁶⁸ President Obama Speaks with VICE News, <<https://news.vice.com/video/president-obama-speaks-with-vice-news>> accessed on 23/03/2015.

doubt that “traditional methods of action are not necessarily effective” in the area of UN peace-keeping.⁹⁶⁹ These traditional methods were stipulated in Articles 41 and 42 of the UN Charter. The Charter’s draughters were, however, motivated by the clear-cut aggression typical of the 1930s.⁹⁷⁰ Many current conflicts, however, are not of the types to which the authority of those articles applies.⁹⁷¹ Today’s conflicts must be resolved by an expanded capacity for preventive diplomacy.⁹⁷²

In this regard, as discussed earlier, preventive diplomacy would be made possible through the participation of NGOs. For example, a Tunisian National Dialogue Quartet⁹⁷³ was awarded the Nobel Peace Prize in 2015 because of its success in helping prevent the Jasmine revolution from descending into chaos.⁹⁷⁴ Another example illustrating how NGOs can play important roles in peace-building missions is Geneva Call, a neutral and impartial NGO that aims to encourage armed non-state actors (ANSAs) to respect international humanitarian norms in armed conflict and other situations of violence.⁹⁷⁵ Its unique approach, based on the issue-specific Deeds of Commitment, has also been recognized as a successful model by the UN’s Secretary-General.⁹⁷⁶

⁹⁶⁹ Helena Cook, ‘Amnesty International at the United Nations’ in Peter Willets (ed.) *The Conscience of the World: Influence of NGOs on the UN System* (C. Hurst & Co., 1995), pp.181-213, p.208.

⁹⁷⁰ Wilenski (n75), p.439.

⁹⁷¹ *ibid*

⁹⁷² *ibid*

⁹⁷³ The Tunisian national dialogue quartet is a coalition of groups from civil society

⁹⁷⁴ ‘Tunisian National Dialogue Quartet Wins 2015 Nobel Peace Prize’ *The Guardian* (9 October 2015)

<http://www.theguardian.com/world/2015/oct/09/tunisian-national-dialogue-quartet-wins-2015-nobel-peace-prize>

⁹⁷⁵ ‘Geneva Call’ <http://www.genevacall.org/who-we-are/> accessed on 02/12/15

⁹⁷⁶ *ibid*

Barack Obama responded to a question about the problem posed by ISIL by saying that

*we cannot keep on thinking about counter-terrorism and security as entirely separate from diplomacy, development, education. All these things that are considered soft, but in fact, are vital to our national security.*⁹⁷⁷

He believes that traditional methods are not adequate to bring about solutions, and emphasizes the importance of other instruments in bringing about permanent solutions for international peace and security. He also expects that increased investment in these instruments would make it possible to prevent conflicts in advance,⁹⁷⁸ and thereby to build durable solutions.

Obama accepts that such alternative methods are not adequately funded:⁹⁷⁹ enough resources are not devoted to diplomacy, development and education. In this context, the importance of NGOs cannot be denied, as they are indeed rich in such resources. Barker also rightly indicates that diplomats must work alongside humanitarian agencies in the maintenance of peace in conflict regions.⁹⁸⁰ The world's biggest military power, the US, itself considers the use of alternative ways of dealing with international peace and security, admitting its inadequacy in these respects. The inconsistency in entrusting international peace and security

⁹⁷⁷ President Obama Speaks with VICE News, <https://news.vice.com/video/president-obama-speaks-with-vice-news> 17 March 2015, accessed on 23/03/2015

⁹⁷⁸ He has said that he is confident that ISIL will be defeated. However, he added that even if this transpires, educational and development problems in the region are of concern. He gives an example in which "a young man who is growing up, has no education and has no prospects for the future, is looking around, and the one that he can get validation, power, respect as if he is a fighter. And this looks like the toughest gang around, so let me affiliate with them." In this regard, NGOs are suitable actors to work with the Security Council, sharing their resources to prevent such outcomes.

⁹⁷⁹ *ibid*

⁹⁸⁰ J. Craig Barker, 'The Function of Diplomatic Missions in Times of Armed Conflict or Foreign Armed Intervention' (2012) *Nordic Journal of International Law*, pp.387-406, p.404

to the state-based Security Council ought to be obvious. This is a conundrum to which realists have no answer.⁹⁸¹ If a superpower admits its inadequacy to dealing with international peace and security issues, then realists must be forced to reconsider the idea that states are only actors in the international legal order.

A recent Report of the Panel in 2015 stresses, with regard to conflict prevention and mediation, that

*[a]t the global level, the United Nations must mobilize a new international commitment to preventing conflict and mobilizing partnerships to support political solutions. It must find ways to draw upon the knowledge and resources of others beyond the United Nations system through civil society...*⁹⁸²

The report explicitly underlines the necessity of alternative civil resources that could be used to prevent conflicts more efficiently and to mediation.

Once the Security Council embarks on democratic reform, it would enhance its ability to maintain international peace and security. Indeed, a measure of any well-ordered society is its ability to resolve conflicts through peaceful dialogue.⁹⁸³ Boutros-Ghali asserts that “without true democracy in international relations, peace will not endure, and a satisfactory pace of development cannot be assured”.⁹⁸⁴ There is thus a strong relationship between democracy and peace. The process of democratization in the Security Council, which involves granting

⁹⁸¹ According to the realist view, states are only actors that can address global problems. This view of transnational democracy has been discussed in Chapter II

⁹⁸² United Nations A/70/95-S/2015/446

⁹⁸³ Ian Johnstone, *The Power of Deliberation: International Law, Politics and Organizations* (OUP, 2011), p.3.

⁹⁸⁴ Boutros Boutros-Ghali, ‘An Agenda For Development’ (1994) A/48/935, para.133.

formal access to NGOs, can therefore help promote more peaceful settlements in conflict cases. As a first step towards democracy, formal participation by NGOs might transform the Council's customary reflex as regards the maintenance of international peace and security, enabling it to develop new skills such as the more efficient use of diplomatic power.

What is more, it has become clear enough that responding to international threats by military intervention is mostly not the best solution. The Security Council has indeed had a bad reputation regarding its military interventions. An example is the Libyan operation of 2011, where there was the possibility of managing an agreement through diplomatic means rather than using force.⁹⁸⁵ A Libyan expert at the International Crisis Group, Hugh Roberts, said

*One hopes it will encourage NATO and Western governments to reconsider the case for a cease-fire, which they appear to have ignored until now; the great danger is that out of laziness, politicians will continue to succumb to the false argument that there is no alternative to military intervention.*⁹⁸⁶

⁹⁸⁵ "Hugo Chavez say Qaddafi has agreed to his conflict resolution plan proposed, involving negotiations through an international committee." Read more at: <<http://www.businessinsider.com/chavez-qaddafi-2011-3?IR=T>>, However, response to this diplomatic call was not taken seriously as many underestimated and did not put trust on it. See more at: Reuters, 'Analyst View: How serious is the Chavez Libya peace plan?' <<http://www.reuters.com/article/2011/03/03/us-libya-venezuela-analyst-view-idUSTRE7222Q720110303>>, for example, 'African Union: Gadhafi will not be part of peace negotiations' <<http://edition.cnn.com/2011/WORLD/africa/06/26/libya.war/>>.

⁹⁸⁶ Ernesto Londoño, 'NATO Confirms It Hit Wrong Target, Killing Libyan Civilians' (19 June 2011) The Washington Post <https://www.washingtonpost.com/world/middle-east/nato-says-strike-may-have-killed-libyan-civilians/2011/06/19/AGL7VdbH_story.html> accessed 12/07/2015.

In some cases such as in Somalia and Rwanda the Security Council simply abandoned the field when significant casualties were incurred.⁹⁸⁷

In fact, military intervention is mostly the default response to threats to international peace and security, as this form of reaction is believed to be the most appropriate. Nevertheless, the cosmopolitan perspective urges the international community to take other actions.⁹⁸⁸ Failure to do so renders a faulty application of force unlikely to resolve a conflict – in fact, it risks making the situation worse. Camilleri asserts that “reliance on force by states has become increasingly problematic, and its consequences, intended and unintended, increasingly damaging”.⁹⁸⁹ He also emphasises that the issues of peace and security have moved beyond a state-centric view of world.⁹⁹⁰ The traditional approaches adopted by the state-centric Security Council have thus been doomed to failure.

Moreover, disagreements among the veto powers and the real costs involved always render military intervention an expensive option. Maintaining international peace and security should not only mean bombing targets and destroying threats (with the attendant threat of “collateral damage”, including many innocent people and the most important resources of the country). There is a variety of tools with which to maintain peace and security that avoid causing new and serious problems. For example, diplomatic means could be essential for this

⁹⁸⁷ David M. Malone, ‘The Security Council in the Post-Cold War Era: A Study in the Creative Interpretation of the UN Charter’ (2003) 35 New York University Journal of International Law and Politics, pp.487-517, p.492.

⁹⁸⁸ Archibugi (2004), p.455

⁹⁸⁹ Joseph A. Camilleri, ‘Peace Operations: the Road Ahead’ in Esref Aksu & Joseph A. Camilleri (eds.) *Democratizing Global Governance* (Palgrave Macmillan, 2002), p.230.

⁹⁹⁰ Joseph A. Camilleri, ‘Major Structural Reform’ in Esref Aksu & Joseph A. Camilleri (eds.) *Democratizing Global Governance* (Palgrave Macmillan, 2002), p.257.

purpose, as could arms embargos.⁹⁹¹ Diplomacy would be much easier to implement than military intervention because a consensus is easier to reach and safer, and its real cost is much less. NGOs are the best actors to manage conflicts through these diplomatic instruments, and to bring about the conditions for sustainable peace in the countries within their spheres of influence.

Inter-state relations are widely seen as being based on interests rather than human values.⁹⁹²

For Helena Cook⁹⁹³

*...the political negotiations proceed in the strictest secrecy...peace-keeping operations involve interlinked components-military and civilian-operating in a highly volatile political context. Human rights are too often subordinated to political or military imperatives.*⁹⁹⁴

Whilst NGOs are keen to sort out problems on a voluntary basis, states are equally intent on deal with them in their own interests.⁹⁹⁵ NGOs and states mostly operate according to

⁹⁹¹ Archibugi (2008)

⁹⁹² By way of illustration, after the invasion of Libya, the \$170 billion Libyan reserve has been held in French, German, Italian and UK banks, who have rejected the new transitional government's request for the release of these funds. Libya's oil refineries employ US passport holders. It was also clear that Qaddafi was keen for a diplomatic solution, but this was ignored. Indeed, the military intervention was begun just before the Security Council made its decision. These findings might imply the factors taken into consideration by the states who took action.

⁹⁹³ Helena Cook is a former head of the legal and intergovernmental organizations office, Amnesty International, 1990-1994

⁹⁹⁴ Cook (1995), p.208

⁹⁹⁵ As discussed above, most NGO actions have demonstrated that they have been striving to solve problems caused by states worldwide.

different values: NGOs are concerned about values such as human dignity and morality, while states cannot help framing their own policies in the Machiavellian⁹⁹⁶ manner.

States have mostly failed – or have preferred not – to solve problems peacefully, since their self-interest leads them to abuse their position and involve themselves in conspiracies. To make such entities responsible for maintaining international peace and security would be a contradiction in terms. For example, preventing the sale of weapons to dangerous countries would be an alternative, yet no state intends to take this measure. Peaceful methods are thus more likely to be activated by NGOs than by the state-based system.

Other factors reinforce how military intervention can sometimes be the wrong strategy. For example, defining targets as terrorists and then attempting to eliminate them could be risky, because today's terrorist may become tomorrow's hero. Murithi observes that

*history is replete with erstwhile so-called 'terrorists' who are now feted by the international community as statesman, including Nelson Mandela of South Africa, Gerry Adams of Northern Ireland and the late Yasser Arafat of Palestine.*⁹⁹⁷

The same argument could also be made another way: steps taken by the Security Council should be as peaceful as possible in order not to provoke significant long-term negative outcomes. The Libyan military intervention in 2011 resulted in an ongoing civil war between several groups when central authority collapsed, which has in turn led to the exodus of

⁹⁹⁶ This employs cunning and duplicity in statecraft to achieve the leadership's self-interested goals.

⁹⁹⁷ Murithi (2012), p.134

thousands of Libyan migrants⁹⁹⁸ and the country being used as a base by many terrorist groups.⁹⁹⁹

Iraq was also subject to a traditional state-based action in 2003 that was widely considered to be unlawful. This invasion has led to several ongoing problems in the country and the wider region. According to former UN Secretary-General Kofi Annan,

*The folly of that fateful decision [to invade Iraq] was compounded by post-invasion decisions. The wholesale disbandment of the security forces, among other measures, poured hundreds of thousands of trained and disgruntled soldiers and policemen on to the streets. The ensuing chaos has proved an ideal breeding ground for the Sunni radical groups that have now coalesced around the Islamic State (IS) label.*¹⁰⁰⁰

For reactions to international peace and security issues to be appropriate it is essential to grant NGOs a formal place on the Security Council, as they are best means of promoting peaceful action.

⁹⁹⁸ Eric Sylvers, 'Thousands of Migrants Rescued Off the Coast of Libya' (15 July 2015) The Wall Street Journal <http://www.wsj.com/articles/thousands-of-migrants-rescued-off-the-coast-of-libya-1436991367> accessed on 16/07/2015

⁹⁹⁹ Frederic Wehrey, 'Taking on Operation Dawn: The Creeping Advance of the Islamic State in Western Libya' (24 June 2015) CARNEGIE Endowment for International Peace <http://carnegieendowment.org/syriaincrisis/?fa=60490> accessed on 16/07/15

¹⁰⁰⁰ J Whittall and J Bsesiso, 'War and Siege: The human cost of geopolitical fractures in the Middle East' (15 July 2015) Daily Maverick <http://www.dailymaverick.co.za/article/2015-07-15-war-and-siege-the-human-cost-of-geopolitical-fractures-in-the-middle-east/#.Vad6LPIVikp> accessed on 16/07/15

The UN must work with NGOs in order to increase its legitimacy and efficiency.¹⁰⁰¹ NGOs activities could be very profitable in this respect. An NGO-enriched Security Council would contribute more to international peace and security through its significantly different impact on individual views. It would generate increasingly positive feedback because NGOs mostly do not use intermediaries. They go to conflict regions with their equipment and their own voluntary personnel, who could be from different countries. The Panel Report in 2015 states that

*Several local community actors and civil society representatives expressed the view to the Panel that they found it difficult to interact with United Nations personnel, who appeared remote and aloof. They noted that peacekeepers often lacked training on how to deal with traumatized people and that communication challenges were often compounded by language barriers. Some expressed concern that peace operations did not spend enough time understanding existing capacities for peace and protection or conflict mitigation mechanisms and simply replaced local structures with exogenous ones.*¹⁰⁰²

The report further underlines that the UN needs to establish strong communications with people in conflict regions; involving civil organisations would make this possible.¹⁰⁰³

NGOs could make a significant contribution to the Council in maintaining world peace and security. Paul rightly maintains that it is only to be expected that the cooperation between

¹⁰⁰¹ Wapner (2007) p.257

¹⁰⁰² United Nations, A/70/95-S/2015/446, para.254

¹⁰⁰³ *ibid*, para.255

NGOs and the Security Council may eventually contribute to a stronger system of international law and “a global order that will eventually ensure the values of peace, democracy and human dignity”.¹⁰⁰⁴

This proposal does not totally do away with military operations. Rather, this study proposes that the Council should ensure that the military option is the last one. The use of military force can sometimes be necessary, but reasons of necessity cited by the Council’s state-centric system cannot be relied upon. Under its current structure the Council does not have the actors appropriate to ensure that military force is the last option. NGOs could improve the Council’s preventive diplomacy to solve problems without using that option. In fact, military operations as a necessary deterrent, when their authoritative use could play a convincing role, are the main distinctive feature of the Council. This work thus argues that the Security Council should minimize the use of military force by the more active employment of peaceful measures, rather than doing away with the military option outright. This might be made possible by the formal participation of NGOs.

¹⁰⁰⁴ Paul, (2004), pp.385-386

8.6 Preventing Radical Reactions

One of CD's main purposes is to provide a decision-making process in which individuals affected by decision can take part. This would help decrease the number of marginal groups that have damaged peace and security through their terrorist activities. According to Boutros-Ghali,

*democratic institutions and processes channel competing interests into arenas of discourse and provide means of compromise which can be respected by all participants in debates, thereby minimizing the risk that differences or disputes will erupt into armed conflict or confrontation.*¹⁰⁰⁵

Such eruption happens mostly because individuals may become involved in violent activities when they cannot see any alternative ways of representing themselves.

CD also believes that world democracy could first be achieved by maintaining international democracy. Boutros-Ghali and Alger observe that it is not possible to develop local democracy without maintaining international democracy.¹⁰⁰⁶ The former states that

sustaining democracy and development within States is closely linked to expanding democracy in relations among States and at all levels of the

¹⁰⁰⁵ Boutros Boutros-Ghali, 'An Agenda for Democratization' (1996) United Nations, para.17

¹⁰⁰⁶ See 'Local democracy is not feasible without global democracy' Chadwick F. Alger, 'Searching for Democratic Potential in Emerging Global Governance' in Bruce Morrison (ed.) *Transnational Democracy in Critical and Comparative Perspective: Democracy's Range Reconsidered* (Ashgate, 2003) p.103. Also see 'Democratization within States may fail to take root unless democratization extends to the international arena' Boutros-Ghali (1996), p.27

*international system, therefore, democracy in international relations provides the only basis for building mutual support and respect among nations.*¹⁰⁰⁷

As the Security Council has tried to promote democracy around the world, it must first be a more democratic entity in order to contribute to peace and security.

What is more, the principal causes of war have changed since the collapse of the fascist and communist regimes: they are now unfairness and anomie.¹⁰⁰⁸ Thomas Franck states that

*how the means of a good life are distributed among peoples and persons and whether people and persons are adequately consulted in the decisions that determine their life-prospects: these are the principal determinants of war and peace.*¹⁰⁰⁹

That is to say that terrorism is not the main problem: the key issue is the absence of a democratic international system that could effectively enable individuals to articulate their grievances in non-violent ways.¹⁰¹⁰

In this regard, the Security Council must be more democratic in order to represent the interests of individuals if it would prevent the emergence of marginal terrorist groups and contribute to peace and security. There is also a common belief that “democracy bolsters

¹⁰⁰⁷ Boutros Boutros-Ghali, ‘An Agenda For Development’ (1994) A/48/935, para.133

¹⁰⁰⁸ Thomas M. Franck, ‘Legitimacy and the Democratic Entitlement’ in Fox & Roth (2000) p.25

¹⁰⁰⁹ *ibid*

¹⁰¹⁰ Murithi (n300), p.134

peace and prosperity, and even quells terrorism”.¹⁰¹¹ Democracy in the international community is the way to foster the involvement of all actors. To do this, the Council must employ NGOs by granting them formal participation. Boutros-Ghali emphasises that “non-governmental organizations are a basic form of popular representation in the present day world”.¹⁰¹² Charnovitz also maintains that “NGOs can vocalize the interests of persons not well represented in policymaking”.¹⁰¹³ By the same token, Philip Caryl Jessup affirms that

*facilities offered for direct action by private international organizations serve to give vent to private interests not sufficiently protected by the national governments concerned.*¹⁰¹⁴

Finally, the Panel Report of 2015 also emphasizes that “the need to counter violent extremism necessitates that the United Nations reinforce its collaboration with many international civil society organizations”.¹⁰¹⁵ NGOs undoubtedly constitute an excellent channel for citizens to participate in global affairs, thus increasing the impact of people affected by the Council’s decisions.¹⁰¹⁶ Thus, formal participation by NGOs assumes particular importance, as they are a key element of a more democratic Council.

Nonetheless, democracy may not provide absolute protection from civil war or international conflict. Its main benefit is to provide a process by which a genuine social discourse could

¹⁰¹¹ Jean D’Aspremont, ‘Legitimacy of Governments in the Age of Democracy’ (2005-2006) 38 New York University Journal of International Law & Politics, pp.877-917, p.885

¹⁰¹² Boutros-Ghali (2000)

¹⁰¹³ “Noting that facilities offered for direct action by private international organizations serve to give vent to private interests not sufficiently protected by the national governments concerned” Charnovitz (1997) p.274

¹⁰¹⁴ Philip Caryl Jessup, International Regulation of Economic and Social Questions (1955) p.33 cited in Charnovitz op.cit.

¹⁰¹⁵ United Nations A/70/95-S/2015/446, para.80

¹⁰¹⁶ Archibugi, Balduni & Donati (2000), p.135

take place among individuals legitimately representing the spectrum of opinions and interests in a community.¹⁰¹⁷ It is essential for the Council to be able to facilitate a discourse regarding international problems before taking a decision that might affect millions of people. Of course, decisions can be taken undemocratically, and even then negotiation and discourse could occur. Yet “there can never be a genuine social convergence”.¹⁰¹⁸ As argued in Chapter II, according to CD international decision-making entities must consider the participation of non-state actors in order to reduce the level of social divergence. It is thus truly necessary for the prevention of international conflicts to provide for formal participation of NGOs in the Security Council.

Since the escalation of international terrorism has posed a challenge to the Council, the formal participation of NGOs is a major opportunity to strengthen the interaction between that body and the world’s people. According to Boutros-Ghali, when the Council becomes a democratic institution it would be more likely to

*promote and respect the rule of law, respect individual and minority rights, cope effectively with social conflict, absorb migrant populations and respond to the needs of marginalized groups.*¹⁰¹⁹

Whilst it is possible for democracy to foster the evolution of the social contract upon which lasting peace can be built, it is plain that “a culture of democracy is fundamentally a culture

¹⁰¹⁷ *ibid*

¹⁰¹⁸ *ibid*

¹⁰¹⁹ Boutros-Ghali (1996), para.17

of peace”.¹⁰²⁰ A more democratic Council that would make a greater contribution to world security and peace is possible through the participation of NGOs.

¹⁰²⁰ *ibid*

8.7 Decreasing Lack of Accountability

The Security Council has become more secretive and unaccountable than ever, meeting behind closed doors “in private consultations of the whole” after 1990.¹⁰²¹ Critics and some prominent states have argued that there is a lack of legitimacy in the Council’s work because of practices that are not sufficiently transparent or publicly accountable.¹⁰²²

Liberals believe that

*the “black box” of sovereignty becomes transparent, allowing examination of how and to what extent national governments represent individuals and groups operating in domestic and transnational society.*¹⁰²³

Scholte believes that participation by NGOs could enhance transparency and accountability in global governance by exerting leverage on decision-makers.¹⁰²⁴ Peter Willet also emphasizes that “NGOs make the political process transparent”.¹⁰²⁵ Formal participation by NGOs would thus confer their accountability and transparency on the Council, as they would inform public about what transpires in that body.¹⁰²⁶

¹⁰²¹ *ibid*

¹⁰²² *ibid*

¹⁰²³ Anne-Marie Slaughter Burley, ‘International Law and International Relations Theory: A Dual Agenda’ (1993) 87 AJIL, p.207

¹⁰²⁴ “Pressure from civil society can help bring regulatory frameworks and operations into the open, where they become susceptible to public scrutiny...civil society associations can push authorities in global governance to take greater public responsibility for their actions and policies.” Scholte (2002), p.294

¹⁰²⁵ Willetts (2000), p.208

¹⁰²⁶ NGOs provide transparency as a democratic function by informing the public about IGOs and treaty body activities. Woodward (n595), p.226

Formal participation would allow for progress towards a more participatory Council system. It would firstly help inspire and mobilize citizens to hold their governments accountable for their actions.¹⁰²⁷ Council members would therefore be exposed to civic pressure. Secondly, NGOs would directly make the Council more accountable. Charnovitz states that “NGO involvement may enhance the accountability of IGOs”.¹⁰²⁸ Boutros-Ghali similarly holds that NGO participation “in international relations is, in a way, a guarantee of political legitimacy of those international organizations”.¹⁰²⁹ For example, some international organisations such as the EU and the ILO have already become more open to public scrutiny.¹⁰³⁰

Moreover, some delegates consider the improved relationships between the Council and NGOs as a significant stage in the development of a more “legitimate and effective international political and legal order”.¹⁰³¹ It was believed that NGOs could leverage the Security Council and balance it to make it more legitimate.¹⁰³² When the difficulties with informal access are considered, granting formal access to NGOs would be a significant step to opening the Security Council and its agenda to public examination and participation. This means that the Council would potentially be open to public scrutiny that would make it more accountable.

¹⁰²⁷ For instance, Eveline Herfkens, Executive Coordinator of Millennium Campaign, says that “[i]t was the first time that the United Nations initiated an effort to build awareness of internationally agreed objectives and to inspire and mobilize citizens to hold their Governments accountable for their achievement.” Eveline Herfkens, ‘Looking Back, Looking Forward: The Successes and Challenges of the Millennium Campaign’ <http://vorige.nrc.nl/redactie/binnenland/HerfkensUNChronicle.pdf>

¹⁰²⁸ Charnovitz (1997) p.274

¹⁰²⁹ Boutros Boutros-Ghali, Speech to the DPI Annual Conference, United Nations, New York, September 1995.

¹⁰³⁰ Lindblom (2005)

¹⁰³¹ See: ‘Reforming the Security Council’ was a conference and organised on May 1994. Some of these view can be found in the speeches. <http://www.globalpolicy.org/security-council/security-council-reform/32789-reforming-the-security-council.html> accessed on 15 May 2013, *ibid*

¹⁰³² *ibid*

8.8 Increase Capability

Since the UNSC's establishment in 1945 it has always been the ideal forum for discussing international conflicts and finding proper solutions. Yet, it is obvious that many threats to international peace and security have emerged simultaneously. Ban Ki-moon, UN Secretary General, states that "[t]here is widespread feeling and opinion among member states that considering such dramatic changes in political and security field in the world, the Security Council should change also, in a more democratic way, transparent and accountable way".¹⁰³³ Likewise, the former foreign minister of Brazil, Antonio de Aguiar Patriota, has said that "in addition to interstate conflict and the proliferation of weapons – particularly weapons of mass destruction – new challenges have emerged, such as terrorism and the involvement of non-state actors in internal conflicts".¹⁰³⁴ In that respect, the international legal order has been beset by a bewildering multitude of problems, many of which have derived from features of international politics that subsequent developments have rendered obsolete.¹⁰³⁵ Boutros-Ghali highlightins the influence that "globalisation has had on the ability of the states to manage global problems and dynamics".¹⁰³⁶ Nevertheless the Council does not have the capacity to address global challenges, since it has proved "unable or unwilling to act".¹⁰³⁷

¹⁰³³ Chris McGreal, 'UN Security Council is Failing Syria, Ban Ki-moon Admits' *The Guardian* (London, 7 September 2015) <http://www.theguardian.com/world/2015/sep/07/un-security-council-is-failing-syria-ban-ki-moon> accessed 08/09/15

¹⁰³⁴ Antonio De Aguiar Patriota, 'Globalizing the Security Council' Project Syndicate, 3 June 2013, <<https://www.project-syndicate.org/commentary/the-urgent-need-to-reform-the-un-security-council-by-antonio-de-aguiar-patriota>>

¹⁰³⁵ Roberts & Kingsbury (1993), p.3

¹⁰³⁶ Archibugi, Balduni & Donati (2000), p.138

¹⁰³⁷ Patriota (n352)

The Security Council's exclusively state-based system renders it inadequate to deal with all these problems in a timely manner. In order to keep pace with the sweeping changes of the 1990s, the Council must consider the formal participation of these new actors. New, non-state actors have increased their influence in world affairs, and it has become indispensable to integrate these into existing international structures and mechanisms.¹⁰³⁸ Granting formal access to NGOs would increase its capacity to address international peace and security issues. Adam Smith's classic theory of the division of labour provides a useful model in this respect.¹⁰³⁹ Of all the functions necessary for the Security Council's operations, it can fulfil some only very inefficiently. NGOs are far better placed to play these roles, thereby improving the Council's overall ability to provide more services for the maintenance of peace and security. The operational role of NGOs is acknowledged – Wapner among others notes that the UN already regards NGOs as significant actors in its operational activities.¹⁰⁴⁰ They are indeed suitable agents to help the UN implement its mandates and support its humanitarian assistance and human rights protection.¹⁰⁴¹

Greater NGO participation would strengthen the Council as a whole, since globalization has produced new challenges to international peace and security. The report of Panel of Eminent Persons in 2004 states that “today's conflicts appear to be more complex than ever”.¹⁰⁴² This

¹⁰³⁸ Archibugi (2008) p.109

¹⁰³⁹ Adam Smith, *An Inquiry Into the Nature and Causes of the Wealth of Nations* (1976)

¹⁰⁴⁰ Wapner (2007) p.259

¹⁰⁴¹ NGOs provide humanitarian assistance directly by using their resources. With regard to human rights protection, they attempt to influence the decision-making process in order to protect human rights. Martens, 'NGOs in the UN System', p.12

¹⁰⁴² Report of the Panel of Eminent Persons on United Nations–Civil Society Relations, 'We the Peoples: Civil Society, The United Nations And Global Governance' (11 June 2004) UN Document A/58/817, p.45

being the case, states have been unable to cope with these new challenges by themselves.¹⁰⁴³

These challenges include, but are not limited to, “global environmental issues, refugee flows and mass migration across borders, the rapid spread of infectious diseases, unsustainable development models, civil war that threatens international peace and security, drug trafficking, global terrorism, transnational crime and illegal stocks of nuclear, biological and chemical weapons”.¹⁰⁴⁴

These new challenges have forced States to cooperate with other actors.¹⁰⁴⁵ Baehr maintains that “the treaty-based monitoring committees and the Charter-based special procedures could hardly have functioned, if not fed by the information that is supplied by NGOs”.¹⁰⁴⁶ The Security Council, as a Charter-based organ, is thus intimately bound up with NGOs’ participation. Some authors rightly consider that

*problem solving in an increasingly diverse and complex network/knowledge society requires action beyond what states can shoulder, [so] it needs pragmatic deliberation involving multiple sources of knowledge, experience, and control.*¹⁰⁴⁷

The Security Council capacity to deal with these new emerging problems is not, however adequate because of its exclusive composition of state actors. The Council acts very slowly

¹⁰⁴³ Nikola Lakic, ‘Is Globalization a Challenge or a Threat to Nation-States as a Dominant Form of Polity?’ (2011) 21, *Western Balkans Security Observer*, p.6

¹⁰⁴⁴ Baylis & others (2011)

¹⁰⁴⁵ *ibid*

¹⁰⁴⁶ Peter R. Baehr, *Non-Governmental Human Rights Organizations in International Relations* (Palgrave Macmillan, 2009), p.127

¹⁰⁴⁷ Pauwelyn & others (2014), p.763

and sometimes causes deadlock because of its state-centric system and decision-making processes. NGOs, on the other hand, have distinct advantages over states and international organizations.¹⁰⁴⁸ They are generally independent of any sovereign state, enabling them to execute international policy more quickly and directly.¹⁰⁴⁹ They have a marked ability to cope with the new challenges of the international legal order because their possession of considerable “on-the-ground knowledge, new tools, new skills in social and cultural analysis, the active involvement of communities and their leaders, links to vulnerable groups and bridges to mainstream development processes” gives them the tools to adequately address these new demands.¹⁰⁵⁰

NGOs are bolder than states. There is no limit to the situations in which they can involve themselves; likewise, they can exceed any limits imposed by powerful authorities in calling them to account for their wrongful policies.¹⁰⁵¹ Their independence and non-profit nature allows NGOs to raise objections to veto powers that the non-permanent Council members dare not raise. States’ reasoning is based on their interests, NGOs on their values. Besides, NGOs are intrinsically much more altruistic.¹⁰⁵² Given the Council’s state-centric structure, it would be naïve to hope that it would in the interests of international peace and security.¹⁰⁵³

¹⁰⁴⁸ Karen A. Mingst, *Essentials of International Relations* (W.W. Norton & Company, 5th ed., 2011) p.215

¹⁰⁴⁹ *ibid*

¹⁰⁵⁰ Report of the Panel of Eminent Persons 2004 (59)

¹⁰⁵¹ There is a fear that detrimental governmental policies would be exposed to challenges by NGOs. See Daniel C. Esty, ‘Why the World Trade Organization Needs Environmental NGOs’ International Centre for Trade and Sustainable Development, p.7

¹⁰⁵² This point is argued in Chapter IV.

¹⁰⁵³ Even when the Council provides peacekeepers for a conflict area, significant problems could be raised by the delivery of assistance through a state-centric system. For example, a report obtained by the Associated Press (AP) states that UN peacekeepers have been involved in sexual exploitation in Haiti. The report also finds that this was badly underreported. There are also similar allegations regarding peacekeepers in the Congo, Liberia

NGOs could be a remedy for this lack of altruism in the Council, which they could strengthen by monitoring governmental compliance. Otherwise, as the report indicates, “without well-organized, well equipped social organizations, legislators would find it impossible to apply protective laws which are being asked for”.¹⁰⁵⁴

Their unique capabilities in all of these fields increase NGOs’ indispensability as partners for the Security Council.¹⁰⁵⁵ Kofi Annan declares it to be an absolute necessity to provide “full opportunities to non-governmental organizations and other non-state actors to make their indispensable contribution to the Organization’s work”.¹⁰⁵⁶ The Cardoso Panel¹⁰⁵⁷ issued “a strong plea for a greater role of civil society organizations in the United Nations system”.¹⁰⁵⁸ The Panel believes that “constructively engaging with civil society is a necessity for the United Nations, not an option”.¹⁰⁵⁹ It considers such engagement as essential to enable the UN to better identify and understand global priorities and to mobilize all resources to deal

and South Sudan. Cara Anna, ‘UN: Sex Exploitation by Peacekeepers Strongly Underreported’ Associated Press 10 June 2015

http://hosted.ap.org/dynamic/stories/U/UN_UNITED_NATIONS_PEAKEKEEPERS_SEXUAL_EXPLOITATION?SITE=AP&SECTION=HOME&TEMPLATE=DEFAULT accessed on 18/06/15

¹⁰⁵⁴ Traffic in Women and Children. Report on the International Women’s Associations, League of Nations Doc. C.T.F.E 234 (1925), at 6 cited in Charnovitz (1997) p.275

¹⁰⁵⁵ *ibid*

¹⁰⁵⁶ Report of the Secretary-General, ‘We the Peoples: The Role of the United Nations in the Twenty-First Century’ (27 March 2000) A/54/2000, para.367, p.59. See also The Report of the Secretary General ‘Arrangements and Practices for the Interaction of Non-Governmental Organizations in All Activities of the United Nations System’ A/53/170 (10 July 1998), paras.3 and 32

¹⁰⁵⁷ A/58/817 (n110), p.1. The panel also includes peoples from different countries such as South Africa, the United States, Mali, Mozambique, Philippines, Hungary, Spain, Colombia, Sweden, India and Iran. The Cardoso report should therefore be considered as more than mere commentary, as it was based on concrete searches and analyses

¹⁰⁵⁸ Baehr (2009) p.54

¹⁰⁵⁹ A/58/817, p.3

more effectively with the task at hand.¹⁰⁶⁰ In short, it can be concluded that formal participation by NGOs is important if the Security Council is to increase its capability to deal with problems emerging from the new world order.

¹⁰⁶⁰ *ibid*

CHAPTER NINE

Feasibility of the Proposal: Possible but Difficult

When ideas fail, words come in very handy.

Johann Wolfgang von Goethe

9.1 Viability of an NGO-Enriched Security Council

Of course, there would be some procedural or political battles around granting formal access for NGOs to the Security Council. Significant obstacles must be considered in order to assess the real prospects for this proposal. It would be as well to begin with the fact that

*when the UN Charter was drafted in 1945, nongovernmental organizations (NGOs) attended the San Francisco conference and lobbied successfully to obtain Article 71, providing for "consultative arrangements" with the Economic and Social Council (ECOSOC).*¹⁰⁶¹

This quote constitutes a reminder not to underestimate NGOs' lobbying capabilities; it should also serve to eliminate doubts about the possibility of them obtaining formal status on the Security Council.

¹⁰⁶¹ Willetts (2000), p.191

9.1.1 The Balance of Power Obstacle

An argument that would apply to any reform proposal including the present one is that the current balance of power renders the implementation of any such proposition impossible.

Therien and Belanger-Dumontier state that

*UN discourse and policies related to the promotion of global democracy are circumscribed by the limitations of the UN Charter, which is founded on very traditional power structures.*¹⁰⁶²

Any moves toward a more democratic Security Council would thus founder on the purported rock of the UN Charter.

However, Chapter VII of the present work demonstrates that there is no conceptual reason to preclude the formal participation of NGOs: Article 29 and Rule 39 of the Provisional Rules of Procedure of the Security Council are enough for this purpose. Yet Chapters III and VII argue that the lack of efficient actors rather than the Charter presents the real obstacle to reform.¹⁰⁶³ The UN Charter is in fact quite flexible in this regard, but states as the so-called main actors have been unable to apply efficiently these provisions.

¹⁰⁶² Therien & Belanger-Dumontier (n159), p.360

¹⁰⁶³ According to Article 27, the permanent members are not able to take action by themselves. The “Uniting for Peace” Resolution authorizes the General Assembly to act when disagreement among the veto powers paralyzes the Council.

The taboo against amending the Charter has also been weakening,¹⁰⁶⁴ and demands for UN reform, particularly of the Security Council, have correspondingly become significantly more insistent. If this were not so, studies, reform projects and restructuring of the Council would not have become permanent items on the UN's agenda.¹⁰⁶⁵

Claims of the impossibility of Security Council reform serves the interests of those permanent members who do not want any new actors to appear in their domain, and who may exert pressure on other Council members to comply with this wish. Of course, this does not mean that any other party must voice such obstacles, which would only reinforce a sense of the hopelessness of reform and encourages concession to the Council's current structure by default. Such a reaction simply serves to perpetuate the current situation, as Maragia observes: "such attitudes serve to perpetuate the status quo while ignoring important events that may illuminate the extent to which we need to readjust to cope with new challenges".¹⁰⁶⁶

CD also disputes this deferral to the status quo: it prefers to find an alternative way by which to effectively oppose the hegemonic bloc rather than meekly accepting the impossibility of doing so.¹⁰⁶⁷ Archibugi states that

the strengthening of international institutions, especially if inspired by the values of democracy, would most probably produce the desired effect of obliging

¹⁰⁶⁴ Bertrand (1993), p.432

¹⁰⁶⁵ *ibid*, p.422

¹⁰⁶⁶ Maragia (2002), p.317

¹⁰⁶⁷ Archibugi (2004), p.455

*the United States and its allies to engage in a foreign policy much more in line with their own constitutions.*¹⁰⁶⁸

A first step in the discussion might therefore be simply to refuse automatically to defer to this pessimistic view of Council reform.

This research offers a way to open the Security Council to NGOs, but that would entail public scrutiny; in the long term it would mean that the power of the permanent members would be balanced. Such an obvious potential outcome would probably stiffen the Council's disapproval of such measures, the veto powers in particular.

Such resistance is of course not surprising, nor should it cause the proponents of reform to despair. Any status quo or privileged power, not only those of the P5, is by nature conservative, and would resist any attempt at reform. Murithi observes that members of a body will always use their positions to exert a gatekeeper role regarding the degree and extend of change to be allowed.¹⁰⁶⁹ Archibugi and Held likewise assert that “of course, each actor is likely to persuade its own agenda and may be interested only [in] a few of the components”¹⁰⁷⁰ of the development of a more democratic Security Council.

In this context, “while each agent may act on narrow terms”¹⁰⁷¹, receiving resistance from the permanent members or other states is possible – a struggle, perhaps, but not an impossible

¹⁰⁶⁸ *ibid*

¹⁰⁶⁹ Murithi (2012), p.137

¹⁰⁷⁰ Archibugi and Held (2011), p.437

¹⁰⁷¹ *ibid*

one. The resistance of member states, rather than constituting an insuperable objection, is thus an obstacle that must be confronted. In this regard, NGOs have mostly been granted access over the objections of states. Peter Willetts rightly points out that the rights of NGOs have become established in customary law in the way which NGOs are often able to access intergovernmental proceedings even when the political climate turns against them and when there is remarkable opposition or hostility to their presence.¹⁰⁷² Such obstacles are thus hardly new to NGOs; indeed, their very experience in this respect would help them overcome any opposition.

9.1.2 The Difficulty of Establishing Democracy at the International Level

Achieving democracy in the international realm is thus more difficult than it is within national boundaries. Accordingly, democratic values and norms have remained very weak in many of the world's regions,¹⁰⁷³ and it would consequently be hard to expect such states to approve the participation of NGOs, a development that would pave the way for democracy. A significant number of the UN's member states are not democratic countries, and many of the others are only partly so. Under these circumstances, it is argued that such actors are unlikely to support any democratic project.

Therien and Belanger-Dumontier maintain that "it is doubtful that governments unreceptive to public debate and participation at home would adopt such values at the global level".¹⁰⁷⁴

¹⁰⁷² Willetts (2000), p.205

¹⁰⁷³ Therien & Belanger-Dumontier (n159) p.371.

¹⁰⁷⁴ *ibid*

The anti-democratic constitution of the Security Council is a natural result of its member states' behaviour. They maintain their own anti-democratic structures while complaining of the Council's. When anti-democratic behaviour is unfavourable to them, they become defenders of democracy. This is of course typical of the hypocrisy discussed in Chapter III. It could therefore be seen as ironic that they be served by the Security Council.

Nonetheless, the match between the two types of system could be overwhelmed by such states' desire for democracy: the fact the world has suffered under the Council's regime for decades could be productive of a significant longing among nations for an improved Council. Many attempts have indeed been made to change its structure. The efficient maintenance of international peace and security is essential also for their benefit. These are significant reasons for them to support a more democratic Council.

The approval of other member states, Archibugi argues, is possible because of two significant virtues of democratic states. Of course, Realist theorists would not predict a democratic stamp of regime to necessarily implement a more virtuous foreign policy.¹⁰⁷⁵ Cosmopolitan democracy also acknowledges this lesson from the Realists regarding the lack of necessary coherency between domestic and foreign policies.¹⁰⁷⁶ Yet, cosmopolitan democracy underlines two covered virtues of democratic regimes that might make it possible for states to 'bridge the 'real' and the 'ideal' elements of their foreign policies'.¹⁰⁷⁷ Archibugi argues that the approval of other member states is possible because of two significant virtues of democratic states:

¹⁰⁷⁵ Archibugi (2004), p.442.

¹⁰⁷⁶ *ibid*

¹⁰⁷⁷ *ibid*

*The first of these two virtues is the interest of states in generating and participating in international organizations (Russett and Oneal, 2001) and in favouring trans-national associations. The second virtue is the tendency of states to nourish a greater respect for rules when these are shared among communities that recognize each other as analogous (Kratochwil, 1989; Hurd, 1999).*¹⁰⁷⁸

In that respect, developing a more democratic Security Council would be for benefit of most members of the UN, such a Council would encompass these two virtues. It is thus not inevitable that states will oppose this proposal. Archibugi states that

*even from a Realist perspective it would be wrong to think that the interests of all actors involved in international politics are opposed to democratic management of the decision-making process.*¹⁰⁷⁹

Of course, it is not to be expected that undemocratic states such as China and Russia would approve such a democratic project. This opposition is likely to last as long as their undemocratic systems – which is to say, it is likely to be long term.¹⁰⁸⁰ Their permanent status on the Security Council also disposes them to a conservative bias. However, were other member states to agree on such a project, they would exert significant pressure on the Permanent Five.

¹⁰⁷⁸ *ibid*

¹⁰⁷⁹ *Ibid* p.453.

¹⁰⁸⁰ “Russian President Vladimir Putin enacted a new law over the weekend that allows the country to crack down on “destructive organizations” that operate with foreign backing and threaten “the security of the state.” But rather than targeting terrorist groups, as the language in the legislation seems to suggest, the measure is aimed at NGOs, non-profit organizations that advocate for human rights, the environment, and a wide variety of other causes.” Matthieu Jublin, ‘New Law Allows Russia to Ban ‘Undesirable’ Human Rights Groups and Other NGOs’ (25 May 2015) Vice News.

9.1.3 The Demands of Appropriate Circumstances

Since the Council system is controlled by states, it is difficult to envision them formally agreeing to end their monopoly and “accept sources of international law that are completely outside their sphere of influence”.¹⁰⁸¹ Hans Köchler points out the practical difficulty of this task.¹⁰⁸² In a similar vein, this proposal is unlikely to be considered by politicians or diplomats who are wedded to the principles of realpolitik, their own national or political benefit and the influence of lobby groups.

Nevertheless, this should not mean that such a project will never be implemented. As has been mentioned throughout this thesis, the circumstances necessary to enable this proposal to be implemented must be established. James Paul and Céline Nahory emphasise that “the Council reform is a process for the long haul, not a quick fix”.¹⁰⁸³ Consequently, it is plausible to say that NGOs can have formal status on the Security Council when states or NGOs ensure that the appropriate conditions exist. For example, even regular informal meetings were regarded as an unexpected development. James Paul indicates that

The NGO Working Group on the Security Council is an influential forum at the United Nations. When it was founded in 1995, no one imagined that an NGO body could have regular interaction with Council members at the highest level.

¹⁰⁸¹ Pauwelyn & others (2014), p.745.

¹⁰⁸² Köchler (2007) p.13

¹⁰⁸³ James Paul and Céline Nahory, ‘Theses Towards a Democratic Reform of the UN Security Council’ Global Policy Forum, July 2005. Likewise, Camilleri states that ‘the change need not be accomplished overnight.’ Camilleri, ‘Major Structural Reform’, p.260.

*But the Working Group proved that the unexpected can happen, even in the high-stakes world of international policy.*¹⁰⁸⁴

On the other hand, it would indeed be unfair to disregard the necessity for a progressive process.¹⁰⁸⁵ “A few years ago, no one spoke of the democratization of the United Nations system, [while] today, it can be seriously contemplated.”¹⁰⁸⁶ This question has in fact been placed on many relevant agenda today.¹⁰⁸⁷ The UN was therefore reflecting the nascent debate on the democratic deficit in the early 1990s. It has become imbued with the idea¹⁰⁸⁸ that “the model of human political organization means that everywhere the exercise of power requires the consent of those that are governed”.¹⁰⁸⁹ The formal consultative relations between ECOSOC and NGOs have likewise been refined at least three times in regard to the developments of world affairs since then, respectively by ECOSOC resolutions 1296 (XLIV) in 1968, 1996/31 in 1996 and the 2004 Cardoso Resolution entitled “We the Peoples: Civil Society, the United Nations and Global Governance”.¹⁰⁹⁰ It is acknowledged that these enhancements in NGOs’ roles originate in the realities of the world order, and can be considered as a lengthy process of expansion of NGOs’ roles in ECOSOC.

¹⁰⁸⁴ Paul (2004)

¹⁰⁸⁵ Likewise, Hachez thinks that “the change will probably take place surreptitiously”. Hachez (2008), p.83

¹⁰⁸⁶ Boutros-Ghali (SG/SM/5809), <http://www.un.org/News/Press/docs/1995/19951110.sgsm5809.html> accessed on 22/07/14

¹⁰⁸⁷ Therien & Belanger-Dumontier (n159) p.360

¹⁰⁸⁸ *ibid*

¹⁰⁸⁹ Dervis & Ozer (2005), p.5

¹⁰⁹⁰ Wapner, (2007), p.257

The previous chapter has referred to the fact that Article 71 of the UN Charter only mentions ECOSOC, empowering that organization alone to make arrangements for NGOs to act as consultants on facts regarding which these groups have competence.¹⁰⁹¹ However, these relationships have evolved, and so the Secretary-General has accrued the power to invite NGOs to General Assembly meetings. Even the Security Council has shared in this development as it has been in informal relationships with NGOs since 1982.¹⁰⁹² Given these facts, it is plain that the development of relationships between the UN and NGOs has been a long-term process. The Charter might be important, but circumstances could override any objections. For example, even though NGOs have the right to participate in ECOSOC only in a consultative capacity, in fact, “NGOs have obtained some participation rights that go beyond consultation”.¹⁰⁹³

All reform proposals agree that building an effective Council is both an important and a lengthy process. A mechanism must therefore be devised that would result in a more democratic Council. Such reform must be slow in order to overcome resistance to change on the part of the permanent members.

Any direct attempt to restructure the Security Council would be faced by the implacable opposition of the veto powers. Previous reform proposals that have required Charter

¹⁰⁹¹ *ibid*

¹⁰⁹² *ibid*

¹⁰⁹³ Willetts (2000) p.191

amendments have fared similarly poorly.¹⁰⁹⁴ It would therefore be judicious to ensure that any reform proposal was a slow, progressive process in order to overcome the veto obstacle.

Boutros-Ghali maintains that

*dominance by one country or group of countries must over time evolve into a democratic international system in which all countries can participate, along with new non-States actors involved in international affairs.*¹⁰⁹⁵

Establishing a democratic Security Council would be possible in the long term, because even though there is no direct veto obstacle, one or all of the veto powers might resist the granting of formal access to NGOs. Chuchai Kasemsarn, Thailand's representative, holds that the veto power should first be curtailed and then gradually abolished.¹⁰⁹⁶ NGOs could be the agents of the Council's evolution into a democratic system, using conditions in the international sphere as leverage.¹⁰⁹⁷ After the proper circumstances have been established, the realities of the new world order will demand that the holders of power reach an accommodation with NGOs. For example, Chapter VIII mentions the case of Yugoslavia in 1993, in which the UNSC Resolution mentioned NGOs only by implication.¹⁰⁹⁸ Yet ten years later in the case of Sierra Leone the UNSC Resolution referred explicitly to them.¹⁰⁹⁹ They could bring pressure to bear

¹⁰⁹⁴ The present author disagrees with state-centric reform proposals. There appear to be two reasons for their failure to be implemented: lack of consensus and lack of a progressive approach

¹⁰⁹⁵ Boutros-Ghali (2000), p.107

¹⁰⁹⁶ Press Release GA/9944, Fifty-sixth General Assembly Plenary 35th Meeting (PM)
<http://www.un.org/News/Press/docs/2001/ga9944.doc.htm> accessed on 05/06/2014

¹⁰⁹⁷ As has been mentioned, these changes have been continuing on behalf of NGOs in the international arena

¹⁰⁹⁸ United Nations Security Council Resolution 771

[http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/771\(1992\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/771(1992)) accessed on 20/06/13

¹⁰⁹⁹ UN Security Council Resolution 1470 (2003)

[http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1470\(2003\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1470(2003)) accessed on 20/06/13

on states regarding their behaviour, and could gradually transform attitudes and practices in order to permit the formal participation of NGOs in the Council.

9.1.4 No Need to Amend the Charter

There might be no direct, comprehensive solution to designing a perfect Security Council when the current balance of international relations is taken into consideration. It is easier to persuade states to take single steps towards a democratic Council than to commit them to endorsing a general programme promoting such an institution.¹¹⁰⁰ Granting formal access to NGOs would be a first step towards a more democratic Council. Conferring formal access rights is not a general proposition, since it is possible to establish such a relationship by the affirmative vote of nine members.¹¹⁰¹ It is thus perfectly feasible, because it involves no amendment to the Council's structure. This can be seen as an advantage.

What is more, the outcomes of a more democratic Security Council are likely to evoke major support from UN members. Boutros-Ghali believes that democracy will ensure that the weaker voices in the international system are heard. This would make the present proposal highly attractive to most members of the UN, who have been kept isolated from the outset by the organization's mechanism. Such an outcome would of course also provoke the opposition of the powerful states that have mostly dominated the Council. The majority support of the weaker actors would, however, overwhelm this obstruction, in part because the weak states

¹¹⁰⁰ Archibugi, Balduni & Donati (2000), p.140

¹¹⁰¹ This can be achieved by the non-permanent members voting alone if the permanent ones do not exercise their double veto option

form more than two-thirds of the UN, a majority that would make a more democratic Council quite likely.

9.1.5 Requirements of a Progressive Approach

One might think that the achievement of democracy within the Security Council requires a radical and direct transformation.¹¹⁰² The Council's state-centric structure would not, however, realistically embrace any such immediately thoroughgoing change, since that would depend on extraordinary events. Even when it is possible for a system to adopt changes, it would require a long period of time to do so. This does not surprise Archibugi and Held,¹¹⁰³ according to whom the number of UN actors that must be consulted in the decision-making process has already increased significantly, implying that pluralism in international relations has steadily expanded. It is therefore highly possible for some long-term trends toward a more democratic global governance to come into play.¹¹⁰⁴

The application of direct, radical changes may have negative effects such as the withdrawal of member states. The demise of the League of Nations¹¹⁰⁵ was due partly to the unreadiness of the international system and its constituent states to come together under the aegis of an organization to discuss their problems. The aftermath of World War II, and especially the spectre of nuclear holocaust, made states graphically aware that they should find ways to avoid war. Informal meetings between the Security Council and NGOs were at first rejected,

¹¹⁰² Murithi (n300), p.143

¹¹⁰³ Archibugi and Held (2011) p.435

¹¹⁰⁴ *ibid*

¹¹⁰⁵ For example, it has been acknowledged that the US's absence was a reason for the League's expiry.

but when states realized that they had to accept the existence of NGOs, they agreed to meet with them, at least informally. Some process is therefore imperative to prepare the ground for the establishment of a new system.

9.1.6 The Status Quo Obstacle

It is also possible to believe that

*the status quo is intact and the likely scenario is that the appearance of [the] process towards SC reform will continue to plod along for another few decades until some member states come to realization about abject futility of the exercise.*¹¹⁰⁶

Yet this would be to ignore developments in the UN system. James Paul believes that NGOs could take encouragement from their evident efficiency, speed of reaction, success and “the breadth of their support by international public opinion”.¹¹⁰⁷ They have thus achieved a remarkable standing in the Security Council in just a decade.¹¹⁰⁸

The UN has been much more attentive than before to the “claims of transnational movements that promote a more inclusive and democratic vision of global governance”.¹¹⁰⁹ Therien and Belanger-Dumontier point out that “the UN has indisputably helped the idea of global

¹¹⁰⁶ Murithi (n300), p.133

¹¹⁰⁷ Paul (2004), p.386

¹¹⁰⁸ *ibid*

¹¹⁰⁹ Therien & Belanger-Dumontier (n159), p.360

democracy to more firmly take root in modern political life”.¹¹¹⁰ Member states are indeed already aware that the current structure is out of date, but they might endeavour to maintain their positions as long as they can. Thus, it would be more accurate to say that Council reform may take a long time, until member states are no longer able to sustain the status quo. When the situation does finally arise, the five permanent members will have to fix the Council’s system by allowing formal access to NGOs.

NGOs could occupy a more exalted place than states allocate to them.¹¹¹¹ One example that illustrates how NGOs could progressively have access to the decision-making process of an international treaty is Article 8(3) of the Convention Concerning the Protection of the World Cultural and Natural Heritage of 1972,¹¹¹² which reads

*...at the request of States Parties to the Convention meeting in general assembly during the ordinary sessions of the General Conference of the UNESCO, representatives of other intergovernmental or non-governmental organizations, with similar objectives, may attend the meetings of the Committee in an advisory capacity’.*¹¹¹³

Another is that, after NGOs were afforded a place, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) also provided access to NGOs.

¹¹¹⁰ *ibid* p.372

¹¹¹¹ “Things did not, however, quite happen the way governments had initially planned, and NGOs quickly started to occupy more space than had been made for them.” Hachez (2008), p.68

¹¹¹² The General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO) meeting in Paris from 17 October to 21 November 1972

¹¹¹³ These NGOs are specified in the same articles as in the International Centre for the Study of the Preservation and Restoration of Cultural Property (ICCROM), a representative of the International Council of Monuments and Sites (ICOMOS) and a representative of the International Union for Conservation of Nature and Natural Resources (IUCN)

According to Article 11(7) of the CITES convention, NGOs could be “represented at meetings of the Conference by observers, shall be admitted unless at least one-third of the Parties present object”.¹¹¹⁴ In these cases, NGOs accomplishments eventually persuaded members states to grant them places.¹¹¹⁵

The veto power might seem to render the participation of NGOs on the Security Council difficult. This is true in that some permanent, and even non-permanent, members would demonstrate hostility to granting NGOs formal participation rights. In fact, this would only result in challenges and delays: it would indeed make such access more difficult, but not impossible. Peter Willets disagrees that NGOs are rejected for political reasons. He believes that “hostility from particular governments often leads to challenges and perhaps delay, but not rejection”.¹¹¹⁶ He also asserts that rejection or underrepresentation of NGOs arises from their own negligence of the UN.¹¹¹⁷ Besides, as mentioned in Chapter VIII, formal participation of NGOs in the Council is important for the sake of the elected members and those states that have complained about the permanent members. Apart from the Permanent Five, such a proposal could therefore receive considerable support from UN members. While not underestimating the role that states’ approval would play, the greater part by far is actually played by the performance of NGOs themselves.

¹¹¹⁴ CITES Convention Article 11(7) <http://www.cites.org/eng/disc/text.php#XI>

¹¹¹⁵ NGOs first targets were friendly governments, from which a synergism emerged that allowed NGOs to influence decision-makers. NGOs’ lobbying power enabled them to frame the issues under discussion and resulted in the appearance of their ideas in governmental negotiating texts. Louis Emmerij, Richard Jolly and Thomas G. Weiss, *Ahead of Curve?: UN Ideas and Global Challenges* (Indiana University Press, 2001), p.117

¹¹¹⁶ Willets (2000), pp.192-193

¹¹¹⁷ *ibid*

As discussed in Chapter IV, there is no definitive legislation providing for participation by NGOs. Circumstances therefore play the determining role in this regard. It follows that one cannot predict the inevitability of the rejection by Russia, China or any other permanent members of participation by NGOs on the Council, because circumstances might confound such an expectation. Besides, the informal access already enjoyed by NGOs under suitable conditions makes it highly likely that formal participation also will be granted.

9.1.7 Supporting Developments

Another consideration supports the feasibility of this reform proposal: the power of the Council's permanent members has already been eroded by significant changes in the international legal order. NGOs have persuaded the Council to adopt certain resolutions even though they are not non-permanent members, meaning that their unofficial status on the Council does not preclude their successfulness. The new demands posed by the international legal order have also encouraged the Security Council to accept that the UN Charter is not immutable.

The UN Charter clearly requires the vote of all permanent Council members in order take action under Chapter VI and Article 52(3).¹¹¹⁸ Yet the Council can still claim authority even

¹¹¹⁸ Article 27 of the UN charter states that "Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting."

when one of its permanent members does not cast a vote by abstaining or by absence.¹¹¹⁹ This is one example that shows how the Charter could be reinterpreted by considering circumstances.

When the international legal order before the 1990s is compared to the subsequent period, it can be observed that the Security Council has already decreased its authority and shared its responsibilities. The founders of the Charter aimed to confine its system largely to the maintenance of international peace and security by the five permanent members of the Security Council.¹¹²⁰ Article 39 explicitly confirms this authority, Article 12 precludes the General Assembly¹¹²¹ from debating security issues on its own authority, and Articles 52-53 limit regional organizations to acting only with Security Council approval; even the Secretary-General's¹¹²² powers are ineffective and weak in this respect.¹¹²³ The major powers, the five permanent members of the Security Council, have enjoyed their Charter-mandated position as the only rulers with the authority to discuss security subjects and address solutions pursuant to the UN Charter.

¹¹¹⁹ "Article 27, properly construed, requires an affirmative vote of the five permanent members. The phrase "concurring votes" appears only in the Russian and English texts of the Charter. The Chinese text requires the "agreement" of all the permanent members, while the French text requires "the votes" of all the permanent members. The Spanish text requires the "affirmative votes" of all the permanent members. Ambiguous terms in a treaty must be read to comport with all the texts. The only reading that comports with all five texts is one that calls for an affirmative vote by the five permanent members. However, the Security Council practice is firmly in the direction of considering a resolution adopted if permanent members abstain." John Quigley, 'The United Nations Security Council: Promethean Protector or Helpless Hostage?' (2000) 35 Texas International Law Journal, pp.129-172, p.164

¹¹²⁰ Shaw (n538), p.1206

¹¹²¹ "...the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests..."

¹¹²² Articles 98-99

¹¹²³ Morrison (2004) p.337

Nevertheless an evolution of customary international law has resulted from new demands; the limitations described above have already been exceeded. The UN Charter has therefore been reinterpreted in order to make it conform to the facts of the international legal order. For example, the clear statement of the Charter, the “Uniting For Peace” resolution, was taken by the General Assembly to claim authority in the field of security and peace because of the Council’s ineffectiveness. Secretary-General Dag Hammarskjöld also “expanded his own authority and presence into the vacuum left by the stalemate of the Cold War”.¹¹²⁴

More interpretations and developments followed after the collapse of the Cold War. Since 1968, the provisions of ECOSOC Resolution 1296 (XLIV) has governed the rules and procedures concerning NGO consultative status with ECOSOC and its subsidiary bodies. Changes in the relationship between the UN and NGOs, and in the level of participation by NGOs in the work of the UN, have been manifested in the series of UN conferences held during the 1990s, in ECOSOC subsidiary bodies such as the Commissions on Sustainable Development, Human Rights, and the Status of Women, and elsewhere across the UN system. “NGOs have become more present, active and influential at the international level, and more directly engaged in intergovernmental policy setting processes”.¹¹²⁵ Some amendments have therefore been made by ECOSOC Resolution in 1996 in light of these and other developments.¹¹²⁶

¹¹²⁴ *ibid*

¹¹²⁵ ECOSOC Concludes NGO Review (November 1996) < <http://www.globalpolicy.org/home/177-un/31786-ecosoc-concludes-ngo-review.html> > accessed on 24/06/2014

¹¹²⁶ *ibid*

The Security Council even has started to arrange regular informal meetings with NGOs under the Arria Formula in order to benefit from the latter's experience⁶⁹ – a marked improvement on their formerly rare ad hoc interactions with NGOs. It was clear that when circumstances do change, it impels the relevant parties to take action in order to deal with the new situation. In fact, this began to occur even in the Charter's first decade.

These examples provide evidence that the UN Charter is not immutable, and that its interpretation can be adapted to changing circumstances. The formal participation of NGOs does not even contravene the Charter, obviating the need for reinterpretation. Although the resistance of traditional states may make approval of such measures difficult, the Security Council's previous granting of some concessions certainly imply that it is amenable to change when necessary or when circumstances make such developments indispensable. It is, in short, becoming increasingly possible for NGOs eventually to obtain formal access to the Security Council.

9.1.8 Implications for the Veto Power

Apart from all these considerations, some think that removing the Permanent Five's veto power is essential. They may therefore criticize any proposal that does not advocate this on the grounds that it would not address the Council's problem. As mentioned in Chapter III, a significant problem regarding the Council is the lack of effective actors. Tools such as the

“Uniting for Peace” resolution and Article 27 are available.¹¹²⁷ In any case, this does not mean that the veto power is not an obstacle, so it might in fact be true that that power poses a significant problem regarding the Council, and consequently that it should be removed.

However, if the system does not permit such a step, it is more plausible to consider alternative ways. Any proposed solution would otherwise be stymied. The main aim of this proposal is to offer a solution that would be both curative and feasible. The Security Council is as it were diagnosed by the present work as suffering from a severe problem that by its nature requires a long course of treatment. Such treatment necessitates patience because an immediate solution is simply not applicable. “Overdosing” may cause crises for no positive return, and may actually lead to termination. Practical limitations must be considered. Demanding the removal of the veto would have the same “overdosing” effect on the permanent members while still not addressing the problem of the Council’s state-centrism and its inefficiency in dealing with international problems.

History has witnessed momentous changes in social organization worldwide.¹¹²⁸ Contemporaries considered such changes as impossible, even unimaginable. The “elitist

¹¹²⁷ As mentioned in Chapter III, the “Uniting for Peace” resolution could be used to take action when the Council fails to do so; Article 27 states that nine Council votes are required to authorize elected members to prevent the Council from taking undesirable steps.

¹¹²⁸ For example, women did not even have the right to vote until the late 19th century. The US constitution has been amended 27 times since its establishment

approach” emphasized that the highest social strata such as kings should be in authority because they considered them to be an inevitable and unalterable fact of social life.¹¹²⁹

However, there are only a few examples of such systems in the current world order. Their existence could simply have been as products of their times, in which the idea of an administration without kings or an elite class was seen as being as unrealistic as Security Council reform appear to some today. Whenever a proposal mentions measures to reform the Council such as removing the veto from permanent members, it is immediately regarded as unrealistic. It might indeed be unrealistic at present to change the Council’s structure, but this situation should certainly not be regarded as permanent.

In that respect, there are in fact some examples of the UN’s actions not strictly conforming to the letter of its Charter. NGOs have been granted rights, even though these are not mentioned in any provision of the Charter. They have taken part in some specialist UN conferences from the UN’s very inception.¹¹³⁰ While their rights at such conferences have been notably fewer than in ECOSOC, their political status and chances of participation have been significantly higher since the mid-1980s.¹¹³¹ In addition, the rule in Article 27 states that “affirmative votes” of Security Council members are required, but the Council’s practice has been that a resolution can be adopted by the Council even if a permanent member abstains. In short, it is possible for NGOs to exert further leverage on Council members to persuade them not to use their veto power, although there is no provision for this in the Charter.

¹¹²⁹ Fredrick Engelstad, ‘Democratic Elitism: Conflicts and Consensus’ in Heinrich Best, John Hingle eds. *Democratic Elitism: New Theoretical and Comparative Perspectives* (Brill Academic Publishers 2010) p.61

¹¹³⁰ Willetts (2000), p.193

¹¹³¹ The UN’s practice has established global norms for diplomatic behaviour, even enabling NGOs to influence most multilateral arms control measures. *ibid*

9.2 Conclusion

There are significant problems with the Security Council, both in the UN Charter and in practice. The Charter provides the permanent Council members with a veto power. In practice, the first difficulty arises from the use of that power. More problems have been raised by the Council's members themselves. Its non-permanent members have not yet blocked any decision taken by the five permanent members, and the Uniting for Peace Resolution authorises the General Assembly to be final decision-making body on peace and security issues. Yet this authority has mostly been ignored; most UN members have instead criticised the permanent Council members for the Council's failures. Any attempts at reform that rely on the UN's members are therefore unlikely to change the situation.

Secondly, the international legal order has entered the post-Westphalian era. It is thus also important to consider the new facts of the international legal order in order to develop a Security Council that is more representative, accountable and efficient. These facts are the emergence of non-state actors in the international legal order and new problems that states find it hard to deal with but whose resolution is possible by non-state agents. This study proposes that the Security Council should grant formal access to NGOs as new actors capable of dealing with new problems. In that respect, the arguments of CD theory have proved to support the purposes of this study.

As has been discussed, it is preferable for the Security Council to shift its position from "an anchor set in granite" to "an anchor set in sand". For Thomas Franck the UN Charter should

be considered as a “living tree”.¹¹³² Realists may reject such a proposal as idealistic and impracticable. Yet the international legal order has changed significantly, and is still evolving. It is thus the claim that the Security Council’s structure should retain its current for that is in fact neither practicable nor realistic, flying as it does in the face of remarkable international developments.¹¹³³ The present author would certainly reject such an approach to the problem as quite unrealistic. Past attempts at reinforcing international democracy have often met with stiff resistance from a minority of powerful states.¹¹³⁴ However, such opposition to democracy has proved to undermine the efficiency of the Security Council; the inglorious demise of the League of Nations has proved a sobering precursor in this regard.¹¹³⁵

Of course, this proposal might at first be considered as too contentious.¹¹³⁶ States have so far unfortunately not approved the Cardoso Commitment’s¹¹³⁷ suggestions.¹¹³⁸ New UN Secretary-General Ban Ki-moon could if he wanted to revive the panel’s suggestions, but he has not apparently been keen to do so.¹¹³⁹

Nonetheless, the preceding discussion makes it clear that this is not a new situation: not many reform proposals have received support from states. It would not therefore be a

¹¹³² Malone (2003), p.487.

¹¹³³ In the similar way, Woodward indicates that ‘it is no longer realistic to claim that the realm of international law is limited to State interactions’. Woodward (n595), p.230.

¹¹³⁴ Wouters & others (2003), p.37.

¹¹³⁵ Ibid

¹¹³⁶ Menno T. Kamminga, ‘What Makes an NGO Legitimate in the Eyes of States?’ in Anton Vedder (ed.) *NGO Involvement in International Governance and Policy: Sources of Legitimacy* (Brill, 2007), pp.175-195, p.188.

¹¹³⁷ Cardoso report, as aforementioned, recommends to improve and formalize relations with NGOs. See: A/59/817.

¹¹³⁸ Baehr (2009) p.127.

¹¹³⁹ ibid

straightforward step or an easy one for the Security Council to grant formal access to NGOs. However, this obstacle would be progressively overcome with the patient influence of NGOs. These would need to cooperate closely in order to overcome those obstacles.¹¹⁴⁰ Wiessner and Willard state that “an actor with actual or potential influence is a candidate for participation in the decision process”.¹¹⁴¹ NGOs would also be granted further access commensurate with their increasing influence.

Wapner argues that while innumerable problems plague interactions with civil society, “we can look at those relations as a dynamic interplay in which efforts toward good governance are slowly but significantly being worked out”.¹¹⁴² Gillian observes that “it is absolutely clear that, one way or another, relationships with NGOs are going to continue and grow”,¹¹⁴³ and foresees that their relationships with the UN will deepen and strengthen. As the world increasingly becomes smaller, the role and influence of NGOs will continue to increase in significance.¹¹⁴⁴

The time has come for the Security Council to conform to present conditions and prepare for the future rather than preserve the past.¹¹⁴⁵ If the Council continues to attempt to confine NGOs to a purely informal position, thereby ignoring the important developments that have been taking place outside the UN, it runs the risk of losing its central position, and even its

¹¹⁴⁰ *ibid*

¹¹⁴¹ Siegfried Wiessner & Andrew R. Willard, ‘Policy-Oriented Jurisprudence and Human Rights Abuses in International Conflict: Toward a World Public Order of Human Dignity’ (1999) 93 *AJIL*, pp.316-334, p.323

¹¹⁴² Wapner (2007) p.262

¹¹⁴³ Sorensen (n444), p.357

¹¹⁴⁴ *ibid*, p.355

¹¹⁴⁵ Hachez (2008), p.82

relevance, in facing the challenges of global governance.¹¹⁴⁶ On the other hand, it is highly likely that NGOs will progressively, even without consent of states, obtain formal places in the Security Council.¹¹⁴⁷ Donini states that

*new issues and actors are knocking at the UN's door. It is no longer possible to keep them out; if the door is locked they will come in through the window or the cracks in the floor.*¹¹⁴⁸

Archibugi asserts that

*it is no vain hope, therefore, to believe that in time the citizens of the world will take upon themselves the responsibility of managing this small planet of theirs democratically.*¹¹⁴⁹

When such measures have been enacted de jure, its effect will depend on the practice of states in the short term and civil society in the long term. Thus, “only time will tell if this vision is politically sustainable”.¹¹⁵⁰

¹¹⁴⁶ *ibid*

¹¹⁴⁷ Teubner asserts that the dynamics of current world order make it possible for civil society to free itself from the restrictions that nation-state politics had imposed on them. Gunther Teubner, 'Global Private Regimes: Neo-Spontaneous Law and Dual Constitution of Autonomous Sector in World Society?' http://www.jura.uni-frankfurt.de/42852650/global_private_regimes.pdf

¹¹⁴⁸ Donini (1996) p.83

¹¹⁴⁹ Archibugi (1998), p.224

¹¹⁵⁰ Therien & Belanger-Dumontier (n159) p.362

9.3 Limitations of the Study

Providing for formal participation for NGOs is obviously not a comprehensive solution. Be that as it may, such a measure would be a step towards a more democratic Security Council. CD considers the participation of individuals who are affected by the decision-making process. Although many non-state actors could be considered as representatives of individuals, this study limits itself to participation by NGOs. Even in this regard, general evaluation and sources regarding NGOs have been avoided, as the emphasis has remained on relations between the Security Council and NGOs.

9.4 Future Research

This paper has mostly addressed the outcomes of formal NGO participation. There might of course be other outcomes not mentioned, each of which could each be analysed in depth. This thesis also addressees the participation of NGOs as non-state actors, without dealing with other types of non-state actor such as businesses, individual experts and Secretariat personnel. Involvement by these non-state actors could also be discussed.

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